

**UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240**

Secretary of the Interior **Rogers C. B. Morton**
Office of Hearings and Appeals . . . **James R. Richards, Director**
Office of the Solicitor . . . **Kent Frizzell, Solicitor**

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

**Edited by
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1974 to December 31, 1974. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Rogers C. B. Morton served as Secretary of the Interior during the period covered by this volume; Mr. John C. Whitaker, served as Under Secretary; Messrs. Jack Carlson, James T. Clarke, Jack O. Horton, John Kyl, Royston C. Hughes, Nathaniel Reed served as Assistant Secretaries of the Interior; Mr. Kent Frizzell served as Solicitor of the Department of the Interior and Mr. David E. Lingren as Deputy Solicitor. Mr. James R. Richards, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "81 I.D."

A handwritten signature in black ink, reading "Rogers C. B. Morton". The signature is written in a cursive, flowing style.

Secretary of the Interior.

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ERRATA

- Page 14—Correct Title of Decision to read *United States v. Elmer H. Swanson*.
- Page 49—Cols. 1 and 2, legal citation correct Lenning to *Lennig*.
- Page 177—Addition to Syllabus 390.1.0 Indian Probate: State Law: Applicability to *Indian Probate, Intestate Estates: Generally*.
- Page 205—Right Col. Syllabus No. 1, Regulation should read 70.100 (a).
- Page 262—Omission in Topical Index Heading, should read Federal Employees and Officers: Authority to Bind Government.
- Page 292—Right Col., par. 2, line 10 correct citation to read 114 F.2d 221, 225 (3d Cir., 1940).
- Page 316—Right Col. legal citation *French v. Edwards*, 80 U.S. (13 Wall) 506 (1871).
- Page 320—Left Col., par. 1 legal citation should read *Vaughan v. John C. Winston Co.*
- Page 324—Right Col., line 11, correct citation to *Vaughan*.
- Page 457—Right Col., Topical Heading Correction—Contracts: Performance or Default: Waiver and Estoppel.
- Page 473—Left Col., Delete s from Topical Index Heading, should read Mining Claims: Withdrawn Land.
- Page 527—Insert for Headnote—Indian Probate: Rehearing: *Pleading*, Timely Filing, 370.1.
- Page 602—Left. Col., par. 2, line 2, add to legal citation 2 IBMA-348, 80 I.D. 781.

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Navajo Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior, Civil No. C-308-73, D. Utah. Suit pending.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, November 15, 1963 ; case reinstated, February 19, 1964 ; remanded, April 4, 1967 ; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968) ; *cert. denied*, 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alas. Withdrawn, April 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alas. Dismissed, April 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alas. Dismissed, October 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, October 29, 1963 (oral opinion) ; aff'd., 332 F. 2d 62 (9th Cir. 1964) ; no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alas. Dismissed without prejudice, March 2, 1964 ; no appeal.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, December 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, August 2, 1962 ; aff'd., 317 F. 2d 573 (1963) ; no petition.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W.D. Wash. Dismissed with prejudice, December 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott v. U.S. & Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. 3-74-39, D. Idaho. Suit pending.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co., Inc. v. U.S., Ct. Cl. 51-66. Judgment for plaintiff, December 13, 1968; subsequent Contract Officer's dec., December 3, 1969; interim dec., December 2, 1969; Order to Stay Proceedings until March 31, 1970; dismissed with prejudice, August 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. Rogers Morton, et al., Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

City of Phoenix v. Alvin B. Reeves, et al., 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. Rogers C. B. Morton, Secretary of the Interior, & The City of Phoenix, a municipal Corp., Civil No. 74-117 PHX-WPC, D. Ariz. Dismissed with prejudice, August 9, 1974; reconsideration denied, September 24, 1974; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. Rogers C. B. Morton, Secretary of the Interior, et al., No. 72-1417, United States Court of Appeals for the Fourth Circuit. Suit pending.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, March 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), Reconsideration denied by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedaux, 1 IBIA 106; 78 I.D. 234 (1971); IBIA-71-5 (Supp-1) (August 16, 1974); 80 I.D. 390 (1973)

Oneta Lamb Robedaux, et al. v. Rogers C. B. Morton, Civil No. 71-646, D. Okla. Dismissed, January 11, 1973.

Houston Bus Hill v. Rogers C. B. Morton, Civil No. 72-376, W.D. Okla. Judgment for plaintiff, October 29, 1973; amended judgment for plaintiff, November 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill and Thurman S. Hurst v. Rogers C. B. Morton, Secretary of the Interior for the United States, Washington, D.C., Civ. No. 73-528-B, D. W.D. Okla. Suit pending.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. *S. Jack Hinton, et al. v. Stewart L. Udall*, 364 F. 2d 676 (1966); cert. denied, 385 U.S. 878 (1966); supplemented by M-36767, November 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. U.S., Ct. Cl. 274-62. Judgment for plaintiff, January 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. Vyola Olinger Ortner (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41, 81 I.D. 651 (1974)

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3589 LTL, C.D. Cal. Suit pending.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3591 MML, C.D. Cal. Suit pending.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3590 FW, C.D. Cal. Suit pending.

Shell Oil Co., A-30575 (October 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal, August 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)...

Sinclair Oil & Gas Co. v. Stewart L. Udall, Secretary of the Interior, et al., Civil No. 5277, D. Wyo. Judgment for defendant, sub nom. *Atlantic Richfield Co. v. Walter J. Hickel*, 303 F. Supp. 724 (1969); aff'd., 432 F. 2d 587 (10th Cir. 1970); no petition.

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, December 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. Rogers C. B. Morton, et al., Civil No. R-2858, D. Nev. On June 20, 1974 remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction.

Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C. D. Cal. Judgment for plaintiff, January 14, 1970; appeal dismissed, April 6, 1970.

Southwestern Petroleum Corp., et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D. N.M. Judgment for defendant, March 8, 1965; aff'd., 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel, et al., Civil No. A-159-69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd., sub nom. *Standard Oil Co. of California v. Rogers C. B. Morton, et al.*, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D. N.M. Judgment for plaintiff, January 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman, et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, November 1, 1962 (opinion); rev'd., 324 F. 2d 411 (1963); cert. granted, 376 U.S. 961 (1964); Dist. Ct. aff'd., 380 U.S. 1 (1965); rehearing denied, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); aff'd., in part & remanded, 437 F. 2d 636 (1970), aff'd. in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957) Reconsideration denied, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58, Stipulated judgment for plaintiff, December 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil No. 859-581. Judgment for defendant, September 18, 1958; aff'd., 270 F. 2d 319 (1959); cert. denied, 364 U.S. 814 (1960); rehearing denied, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D. N.M. Dismissed with prejudice June 25, 1963.

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, et al., Civil No. 2406-61. Judgment for defendant, March 22, 1962; aff'd., 314 F. 2d 257 (1963); cert. denied, 373 U.S. 951 (1963).

Richard K. Todd, et al., 68 I.D. 291 (1961)

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd., 350 F. 2d 748 (1965); cert. denied, 383 U.S. 912 (1966).

Atwood, et al. v. Stewart L. Udall, Civil Nos. 293-62—299-62, incl. Judgment for defendant, August 2, 1962; aff'd., 350 F. 2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties Inc., d/b/a Toke Cleaners & Launderers v. U.S. Government, Dept. of Interior, Bureau of Indian Affairs, Civil No. A3-74-99, D. N.D. Suit pending.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co., et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd., 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd., 289 F. 2d 790 (1961); no petition.

Union Oil Company of California et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown, et al. v. Stewart Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971; judgment for plaintiff, 370 F. Supp. 108; appeal filed, June 28, 1974.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Harlan H. Hugg, et al. v. Stewart L. Udall, Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Barnette T. Napier, et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

John W. Savage v. Stewart L. Udall, Civil No. 9458, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

The Oil Shale Corp., et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

The Oil Shale Corp., et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

Joseph B. Umpleby, et al. v. Stewart L. Udall, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971.

Union Oil Co. of California, a Corp. v. Stewart L. Udall, Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, March 25, 1967.

Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 2595-64. Judgment for defendant, December 27, 1965; no appeal.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming and Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd., 379 F. 2d 635 (10th Cir. 1967); cert. denied, 389 U.S. 985 (1967).

U.S. v. Alonzo A. Adams, et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams, et al. v. Paul B. Witmer, et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); rev'd. & remanded, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, January 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

U.S. v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an individual and as Executrix of the Last Will of E. A. Barrows, deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, April 20, 1970; aff'd., 447 F. 2d 80 (9th Cir. 1971).

U.S. v. J. L. Block, 80 I.D. 571 (1973)

J. L. Block v. Rogers Morton, Secretary of the Interior, Civil No. LV-74-9, BRT, D. Nev. Suit pending.

U.S. v. Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alas. Judgment for defendant, June 30, 1970; no appeal.

U.S. v. Alice A. & Carrie H. Boyle, 76 I.D. 61, 318 (1969), *Reconsideration denied*, January 22, 1970.

Alice A. & Carrie H. Boyle v. Rogers C. B. Morton, Secretary of the Interior, Civil No. Civ-71-491 Phx WEC, D. Ariz. Judgment for plaintiff, May 4, 1972; appeal docketed September 27, 1972.

U.S. v. R. W. Brubaker, et al., A-30636 (July 24, 1968), 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-1228 EC, C.D. Cal. Dismissed with prejudice, August 13, 1973; aff'd., June 27, 1974; no petition.

U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); aff'd., 399 F. 2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. Alvis F. Denison, et al., 71 I.D. 144 (1964), 76 I.D. 233 (1969)

Marie W. Denison, individually & as Executrix of the Estate of Alvis F. Denison, deceased v. Stewart L. Udall, Civil No. 963, D. Ariz. Remanded, 248 F. Supp. 942 (1965).

Leo E. Shoup v. Stewart L. Udall, Civil No. 5822-Phx., D. Ariz. Judgment for defendant, January 31, 1972.

Reid Smith v. Stewart L. Udall, etc., Civil No. 1053, D. Ariz. Judgment for defendant, January 31, 1972; aff'd., February 1, 1974; *cert. denied*, October 15, 1974.

U.S. v. Everett Foster, et al., 65 I.D. 1 (1958)

Everett Foster, et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, December 5, 1958 (opinion); aff'd., 271 F. 2d 836 (1959); no petition.

U.S. v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk, et al., Civil No. 634, D. Mont. Judgment for plaintiff, 271 F. Supp. 474 (1967); rev'd. & remanded for further proceedings, 419 F. 2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970); judgment for defendant, October 6, 1970.

U.S. v. Charles H. Henrikson, et al., 70 I.D. 212 (1963)

Charles H. Henrikson, et al. v. Stewart L. Udall, et al., Civil No. 41749, N.D. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); aff'd., 350 F. 2d 949 (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1966).

U.S. v. Humboldt Placer Mining Co. & Del De Rosier, 79 I.D. 709 (1972)

Humboldt Placer Mining Co. & Del De Rosier v. Secretary of the Interior, Civil No. S-2755 E.D. Cal. Dismissed with prejudice, June 12, 1974; appeal docketed, September 23, 1974.

U.S. v. Ideal Cement Co., 5 IBLA 235 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Rogers C. B. Morton, Civil No. J-12-72, D. Alas. Judgment for defendant, February 25, 1974; motion to vacate judgment denied, May 6, 1974; appeal docketed, June 3, 1974.

U.S. v. Independent Quick Silver Co., 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. Stewart L. Udall, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. Richard Dean Lance, 73 I.D. 218 (1966)

Richard Dean Lance v. Stewart L. Udall, et al., Civil No. 1864, D. Nev. Judgment for defendant, January 23, 1968; no appeal.

U.S. v. Charles Maher, et al., 5 IBLA 209; 79 I.D. 109 (1972)

Charles Maher & L. Franklin Mader v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 1-72-153, D. Idaho. Dismissed without prejudice, April 3, 1973.

U.S. v. Mary A. Matthey, 67 I.D. 63 (1960)

U.S. v. Edison R. Nogueira, et al., Civil No. 65-220-PH, C.D. Cal. Judgment for defendant, November 16, 1966; rev'd. & remanded, 403 F. 2d 816 (1968); no petition.

U.S. v. William A. McCall, Sr., The Dredge Corp., Estate of Olaf H. Nelson, Deceased, Small Tract Applicants Association, Intervenor, 78 I.D. 71 (1971)

William A. McCall, Sr., The Dredge Corp., & Olaf H. Nelson v. John F. Boyles, et al., Civil No. 74-68 (RDF), D. Nev. Suit pending.

U.S. v. Kenneth McClarty, 71 I.D. 331 (1964), 76 I.D. 193 (1969)

Kenneth McClarty v. Stewart L. Udall, et al., Civil No. 2116, E.D. Wash. Judgment for defendant, May 26, 1966; rev'd. & remanded, 408 F. 2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; vacated & remanded to Bureau of Land Management, August 13, 1969.

U.S. v. Frank & Wanita Melluzzo, et al., 76 I.D. 181 (1969), Reconsideration, 1 IBLA 37; 77 I.D. 172 (1970)

WJM Mining & Development Co., et al. v. Rogers C. B. Morton, Civil No 70-679, D. Ariz. Judgment for defendant, December 8, 1971; appeal docketed January 31, 1972.

U.S. v. Frank & Wanita Melluzzo, 76 I.D. 60 (1969)

Frank & Wanita Melluzzo v. Rogers C. B. Morton, Civil No. CIV 73-308 PHX CAM, D. Ariz. Judgment for defendant, June 19, 1974; appeal docketed, July 23, 1974.

U.S. v. Mineral Ventures, Ltd., 80 I.D. 792 (1973)

Mineral Ventures, Ltd. v. The Secretary of the Interior, Civil No. 74-2v1, D. Ore. Suit pending.

U.S. v. New Jersey Zinc Company, 74 I.D. 191 (1967)

The New Jersey Zinc Corp., a Del. Corp. v. Stewart L. Udall, Civil No. 67-C-404, D. Colo. Dismissed with prejudice, January 5, 1970.

U.S. v. Lloyd O'Callaghan, Sr. et al., 79 I.D. 689 (1972)

Lloyd O'Callaghan, Sr., individually & as Executor of the Estate of Ross O'Callaghan v. Rogers Morton, et al., Civil No. 73-129-S, S.D. Cal. Aff'd. in part & remanded, May 14, 1974.

U.S. v. J. R. Osborne, et al., 77 I.D. 83 (1970)

J. R. Osborne, individually & on behalf of R. R. Borders, et al. v. Rogers C. B. Morton, et al., Civil No. 1564, D. Nev. Judgment for defendant, March 1, 1972; remanded Dist. Ct. with directions to reassess Secretary's conclusion, February 22, 1974; remanded to the Department with orders to re-examine the issues, December 3, 1974.

U.S. v. E. V. Pressentin and Devisees of the H. S. Martin Estate, 71 I.D. 447 (1964)

E. V. Pressentin, Fred J. Martin, Admin. of H. A. Martin Estate v. Stewart L. Udall & Charles Stoddard, Civil No. 1194-65. Judgment for defendant, March 19, 1969; no appeal.

U.S. v. Ollie Mae Shearman et al., 73 I.D. 386 (1966)

See Idaho Desert Land Entries—Indian Hill Group.

U.S. v. C. F. Snyder, et. al., 72 I.D. 223 (1965)

Ruth Snyder, Adm'r[x] of the Estate of C. F. Snyder, Deceased, et al. v. Stewart L. Udall, Civil No. 66-C-131, D. Colo. Judgment for plaintiff, 267 F. Supp. 110 (1967); rev'd., 405 F. 2d 1179 (10th Cir. 1968); cert. denied, 396 U.S. 819 (1969).

U.S. v. Southern Pacific Co., 77 I.D. 41 (1970)

Southern Pacific Co., et al. v. Rogers C. B. Morton, et al., Civil No. S-2155, E.D. Cal. Judgment for defendant, November 20, 1974.

U.S. v. Clarence T. & Mary D. Stevens, 77 I.D. 97 (1970)

Clarence T. & Mary D. Stevens v. Walter J. Hickel, Civil No. 1-70-94, D. Idaho. Judgment for defendant, June 4, 1971.

U.S. v. Elmer H. Swanson, 81 I.D. 14 (1974)

Elmer H. Swanson v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 4-74-10, D. Idaho. Suit pending.

U.S. v. Alfred N. Verrue, 75 I.D. 300 (1968)

Alfred N. Verrue v. U.S., et al., Civil No. 6898 Phx., D. Ariz. Rev'd. & remanded, December 29, 1970; aff'd., 457 F. 2d 1202 (9th Cir. 1971); no petition.

U.S. v. Vernon O. & Ina C. White, 72 I.D. 522 (1965)

Vernon O. White & Ina C. White v. Stewart L. Udall, Civil No. 1-65-122, D. Idaho. Judgment for defendant, January 6, 1967; aff'd., 404 F. 2d 334 (9th Cir. 1968); no petition.

U.S. v. Frank W. Winegar, et al., 81 I.D. 370 (1974)

Shell Oil Co. & D. A. Shale, Inc. v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 74-F-739, D. Colo. Suit pending.

U.S. v. Merle I. Zweifel, et al., 80 I.D. 323 (1973)

Merle I. Zweifel, et al. v. U.S., Civil No. C-5276, D. Colo. Dismissed without prejudice, October 31, 1973.

Kenneth Roberts, et al. v. Rogers C. B. Morton & The Interior Board of Land Appeals, Civil No. C-5308, D. Colo. Dismissed with prejudice, January 23, 1975 (opinion); appeal docketed, March 17, 1975.

E. A. Vaughey, 63 I.D. 85 (1956)

E. A. Vaughey v. Fred A. Seaton, Civil No. 1744-56. Dismissed by stipulation, April 18, 1957; no appeal.

Estate of Florence Bluesky Vessell (Unallotted Lac Courte Oreilles Chippewa of Wisconsin), 1 IBIA 312; 79 I.D. 615 (1972)

Constance Jean Hollen Eskra v. Rogers C. B. Mortan, et al., Civil No. 72-C-428, D. Wis. Dismissed, 380 F. Supp. 205 (1974); appeal docketed, November 6, 1974.

Burt A. Wackerli, et al., 73 I.D. 280 (1966)

Burt & Lueva G. Wackerli, et al. v. Stewart L. Udall, et al., Civil No. 1-66-92, D. Idaho. Amended complaint filed March 17, 1971. Judgment for plaintiff, February 28, 1975.

Weardco Construction Corp., 64 I.D. 376 (1957)

Weardco Construction Corp. v. U.S., Civil No. 278-59-PH, S.D. Cal. Judgment for plaintiff, October 26, 1959; satisfaction of judgment entered February 9, 1960.

Estate of Mary Ursula Rock Wellknown, 1 IBIA 83; 78 I.D. 179 (1971)

William T. Shaw, Jr., et al. v. Rogers C. B. Morton, et al., Civil No. 974, D. Mont. Dismissed, July 6, 1973 (opinion); no appeal.

Frank Winegar, Shell Oil Co. & D. A. Shale Inc., 74 I.D. 161 (1967)

Shell Oil Co., et al. v. Udall, et al., Civil No. 67-C-321, D. Colo. Judgment for plaintiff, September 18, 1967; no appeal.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, 65 I.D. 436 (1958)

Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah, Deceased, Comanche Enrolled Restricted Indian No. 1927 v. Jane Asenap, Wilfred Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Dept. of the Interior, & Earl R. Wiseman, District Director of Internal Revenue, Civil No. 8281, W.D. Okla. Dismissed as to the Examiner of Inheritance; plaintiff dismissed suit without prejudice as to the other defendants.

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- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
- Franco-Western Oil Company *et al.* (Supp.), 65 I.D. 427 is adhered to, 66 I.D. 362.
- Freeman Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W. *et al.*, 16 IBLA 112 (June 28, 1974), 81 I.D. 370.
- Freeman *v.* Texas and Pacific Ry. Co. (42 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Garriss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.

- Garvey v. Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates v. California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Glassford, A. W. et al., 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gleason v. Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Gohrman v. Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein v. Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale v. Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite v. Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy v. Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy v. Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy et al. v. Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg et al. v. State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnel v. Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode v. Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rousseau, 47 L.D. 590).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.
- Hagood, L. N., et al., 65 I.D. 405 (1958); overruled, Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee v. United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart v. Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).
- Hastings and Dakota Ry. Co. v. Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden v. Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes v. Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Heilman v. Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman et al. v. Letroadec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson v. Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Heirs of Talkington v. Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg et al. v. Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey v. Coil (49 L.D. 624); overruled, Dennis v. Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.

- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.
- Herman *v. Chase et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M.A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holbeck, Halvor F., A-30376 (December 2, 1965); overruled, 79 I.D. 416 (1972).
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman *v. Central Montana Mines Co.* (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon *v. Martinas* (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 19 L.D. 86, 284.
- Howard *v. Northern Pacific R.R. Co.* (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell L.C. (39 L.D. 92) (See 39 L.D. 411).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- *Hughes *v. Greatehead* (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).
- Hull *et al v. Ingle* (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.
- *Hyde *et al v. Warren et al* (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).
- *Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).
- Inman *v. Northern Pacific R.R. Co.* (24 L.D. 318); overruled, 28 L.D. 95.
- *Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson *et al.* (A-20411), August 5, 1937, unreported (See 59 I.D. 282, 286).
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
- Jacks *v. Belard et al.* (29 L.D. 369); vacated, 30 L.D. 345.
- Jackson Oil Co. *v. Southern Pacific Ry. Co.* (40 L.D. 528); overruled, 42 L.D. 317.
- Johnson *v. South Dakota* (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones *v. Kennett* (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
- Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929), overruled in part, Arizona Public Service Company, 5 IBLA 137, 79 I.D. 67 (1972).
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.

- Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E. *et al* (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger v. Peck (11 L.D. 202) (See 39 L.D. 162, 225).
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B. *et al*. (30 L.D. 227); overruled, 31 L.D. 64.
- Knight v. Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242.
- Kniskern v. Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- *Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B. *et al*. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law v. State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Layne and Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. v. United States, Court of Claims No. 26-66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Lindermann v. Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).
- Liss, Merwin E., Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonnergran v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al*. (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.

- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden *et al.* *v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMiken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee *v.* Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209, In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 495, 346, 348; 49 L.D. 660.
- Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.

- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* v. Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner v. Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell v. Brown (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 L.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan v. Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 L.D. 369); overruled to extent inconsistent, 71 L.D. 22 (1964).
- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mountain Fuel Supply Company, A-31053 (December 19, 1969), overruled, 79 L.D. 416 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Munsey, Glenn, Earnest Scott and Arnold Scott v. Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 L.D. 501, 509, distinguished, 80 L.D. 251 (1973).
- Myll, Clifton O., 71 L.D. 458 (1964); as supplemented, 71 L.D. 486 (1964), vacated, 72 L.D. 536 (1965).
- National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled, United States v. Maher, Charles *et al.*, 5 IBLA 209, 79 L.D. 109 (1972).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen v. Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.
- *Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 L.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. v. Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. v. Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. v. Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.

- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- *Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- *Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397) (See 58 I.D. 158, 160).
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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1972, Jan. 6: Public Land Order No. 5151—Amendment of Public Land Order No. 5150 (37 FR 142) -----	151	NOTE: The mining Enforcement and Safety Administration has been substituted for the Bureau of Mines in all proceedings pending before the Office of Hearings and Appeals (38 FR 18696, July 10, 1973) -----	170
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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

GEOPHYSICAL INSTRUMENT & SUPPLY CO.

IBCA-996-6-73

IBCA-1003-8-73

Decided January 9, 1974

**Contract No. 53500-CT3-216,
Purchase Order No. 53500-PH3-960,
Theodolites and Tripods, Bureau of
Land Management.**

Denied.

**Contracts: Formation and Validity:
Mistakes—Contracts: Disputes and
Remedies: Termination for Default—
Contracts: Performance or Default:
Generally—Contracts: Performance or
Default: Excusable Delays—Rules of
Practice: Appeals: Burden of Proof**

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake-in-bid claim and (ii) requesting an adjustment in the contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon.

**Contracts: Disputes and Remedies:
Damages: Actual Damages—Con-
tracts: Disputes and Remedies: Ter-**

**mination for Default—Contracts:
Performance or Default: Breach—
Rules of Practice: Appeals: Burden
of Proof**

An excess cost assessment under a contract terminated for default is found to be proper where the reprocurment contractor offered equipment from the same supplier the defaulted contractor had contemplated using at a total price considerably less than the total price the defaulted contractor had requested prior to proceeding with contract performance and the defaulted contractor did not even allege that in effecting the reprocurment the Government had failed to mitigate damages.

**APPEARANCES: H. W. Siegel, Gen-
eral Manager, Denver, Colorado, for
appellant; David E. Lofgren, Depart-
ment Counsel, Portland, Oregon for
the Government.**

OPINION BY MR. MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In these timely appeals the contractor contests the default termination of its contract¹ for various

¹ Appeal File I, Item 4. These consolidated appeals have two separate appeal files designated as Appeal File I and Appeal File II. Except as otherwise specifically indicated, all references to items are to those contained in Appeal File I.

surveying items and the resultant excess cost assessment on the grounds that an unintentional mistake was made when its bid was prepared and that the Government's devaluation of the dollar had increased the acquisition costs for the Swiss-made equipment bid upon by ten percent.²

The Facts

Solicitation No. P-3-167³ issued under date of December 13, 1972, called for the furnishing of the surveying items delivered f.o.b. Anchorage, Alaska, or Medford, Oregon, as shown below:

Item No.	Description	Quantity	F.O.B.
1	Theodolite, surveying (Wild T-2E or equal)* * *	5 ea.	Anchorage, Alaska.
2	Tripod, surveying (Wild Model GST-20 or Wild Model 21-b-EL or equal)* * *	33 ea.	Anchorage, Alaska.
3	Theodolite, surveying (Wild T-16 ED or equal)* * *	1 ea.	Medford, Oreg.
4	Tripod, surveying, heavy duty, extension (Wild 21B or equal)* * *	1 ea.	Medford, Oreg.
5	Solar Prism attachment (Roelofs or equal)* * *	1 ea.	Medford, Oreg.

The solicitation had originally called for the bids to be opened in the Portland Service Center, Bureau of Land Management on January 12, 1973. By Amendment No. 1, dated January 9, 1973, however, the bid opening date was extended to February 7, 1973. Although seven bidders responded to the solicitation, only the bids submitted by the contractor and by Surveyors Service Co. were determined to be responsive. For all five items the appellant's bid totaled \$16,738.60 as compared to a total bid by Survey-

ors Service Co. of \$18,417.50.⁴ On February 15, 1973, award of all of the items covered by the solicitation was made to the contractor.⁵ Subsequently, by letter dated February 21, 1973,⁶ the contractor requested an amendment to the order as issued to take into account the extenuating circumstances set forth in the letter as follows:

The prices we quoted were far below our cost due to lack of notification by the Swiss manufacturer that they substantially increased their prices in December on these quoted items. When we quoted in December, we did so in good faith from the latest available price lists from the Swiss manufacturer for a total figure of \$16,738.60, but if we had been

² The ten percent figure is used by the contractor in calculating the increase in price in its letter of March 2, 1973 (Item 8). In the letter of February 21, 1973 (Item 6) by which the Government was first apprised of the mistake-in-bid claim, the contractor refers to the devaluation of the dollar causing "approximately an additional 9% increase."

³ Item 4.

⁴ Item 20.

⁵ Item 4.

⁶ Item 6.

January 9, 1974

notified by Wild, as we should have been, our total quote would have amounted to \$18,187.00. We are enclosing copies of the old and new prices of Wild Heerbrugg for your reference.

To make matters more disastrous, recently the U.S. had a devaluation of the dollar changing the parity of the dollar versus Swiss francs which caused approximately an addition 9% increase.

Thereafter there was an exchange of several letters between the parties relative to the mistake-in-bid claim. In the letter of April 4, 1973,⁷ the contracting officer advised the contractor that the claim for an increase in price based upon the devaluation of the dollar was not considered a part of the claimed mistake-in-bid and that relief therefor could not be granted. Concerning this element of the claim the letter states: "Even though the devaluation changed the parity of the American dollar and the Swiss franc causing a 9 percent increase in price, it is felt that this type of marketing risk should be considered by the knowledgeable bidder and the resultant margin factors included in the bid price." In the same letter the contractor was asked to state why it had not corrected its prices (i) upon receipt of the new price catalog and (ii) before the award of contract.

In its letter of April 10, 1973,⁸ the contractor responded to the questions posed by the contracting officer, stating:

The new price list which was to be effective in December, GISCO received it

from its supplier on January 19. At that time, GISCO should have notified the government of the change but unfortunately the bid was not pulled for correction by the quotation department for unknown reasons; in fact, I am experiencing difficulties in trying to find out why this mistake occurred and so the error came to light only after the purchase order was received from your office. Admittedly, this shortcoming was our fault and changes in order procedures have been initiated.

Apparently because of the alleged mistake-in-bid and the effect of the devaluation of the dollar upon acquisition of the contract items from a foreign source, the contractor did not proceed with the placement of an order to the Swiss supplier whose surveying equipment it had bid upon, even though when acknowledging receipt of the mistake-in-bid claim on February 27, 1973,⁹ the contracting officer had stated: "You are reminded that the delivery conditions and all provisions and specifications remain in full effect as originally executed."

Following expiration of the time allowed for delivery of the contract items, the contracting officer wrote the contractor on April 19, 1973,¹⁰ to call attention to the rights of the Government under Clause 11 of the General Provisions. The letter concluded with the statement:

This notice is to advise you that unless proof of shipment is received by this office within 10 calendar days after receipt of this letter, the subject contract will be placed in default and the provisions

⁷ Item 14.

⁸ Item 15.

⁹ Item 7.

¹⁰ Item 16.

as stipulated in Clause 11¹¹ of the General Provisions may be enforced.

In its response of April 24, 1973,¹² the contractor referred to the correspondence between the parties pertaining to the contract after which it stated: "So far we have not received a ruling on the various requests."

By letter of May 3, 1973,¹³ the contract was terminated for default. In the same letter the contractor was advised that as stipulated in Clause 11 of the contract it would be "held liable for any excess costs incurred in the reprocurment of the original requirement." On May 11, 1973, the reprocurment contract¹⁴ was awarded to Surveyors Service Co. at the same prices it had bid in response to the solicitation which had resulted in the award of the contract to the appellant. Thereafter by letter dated July 25, 1973,¹⁵ the contractor was advised that the excess procurement costs incurred as a result of its default were assessed against it in the amount of \$1,678.90 and that such sum was immediately due and payable. The letter refers to Dec. Comp. Gen. B-178675 (July 9, 1973),¹⁶ in which it had been held that there was no

basis for permitting a correction of the contractor's mistake in price quotation on the instant contract. A timely appeal was taken from the excess cost assessment.

Decision

Based upon the record made in these proceedings,¹⁷ we find that the mistake-in-bid claimed by the contractor was entirely unilateral in nature and that after the revised price list was received from its foreign supplier on January 19, 1973, the contractor failed to correct its bid to reflect the increased prices payable thereunder even though bids were not opened until February 7, 1973, and award was not made until February 15, 1973.¹⁸ Remaining for consideration is the question of whether in the circumstances of this case the contract was properly terminated for default where the time for delivery passed without the contractor having made any effort to perform and, assuming the termination for default to have been proper, the question of whether the excess costs involved in the reprocurment are properly chargeable to the contractor.

At the outset we note that at no time did the contracting officer acquiesce in the contractor's not proceeding with the performance of the contract pending the resolution of the after award mistake-in-bid

notice of possible error. The contracting officer had no reason to suspect error since the GISCO bid was in line with the only other responsive bid and the Government estimate."

¹⁷ No hearing was requested; accordingly, we have nothing before us but the written record.

¹⁸ Items 15 and 20.

¹¹ Item 4. The General Provisions are those contained in Standard Form 32 (November 1969 Edition). The contract was prepared on Standard Form 33 (November 1969) and included Solicitation Instructions and Conditions set forth in Standard Form 33A (March 1969).

¹² Item 17.

¹³ Item 18.

¹⁴ Appeal File II, Item 1.

¹⁵ Appeal File II, Item 4.

¹⁶ Item 24. In especially pertinent part the decision reads: "* * * we find no basis to increase the contract price as requested since the contracting officer made award without

January 9, 1974

claim or the claim for an adjustment in the contract price based upon the devaluation of the dollar. In fact, within a week of the time these questions were first raised, the contracting officer specifically advised the contractor that "the delivery conditions and all provisions and specifications remain in full effect as originally executed."¹⁹

With respect to the mistake-in-bid claim, the record discloses that the claim was processed in accordance with the procedures prescribed in the applicable regulations²⁰ and that the Comptroller General's decision thereon was adverse to the contractor.²¹ As the contractor did not undertake to perform the contract, the question of who should bear the economic consequences of the Government having devalued the dollar is not before us.²² Since

at the time of the default termination the contractor had failed to make delivery of the required items within the period specified and since the contractor has failed to show that it was precluded from proceeding with performance of the contract pending the resolution of the dispute by reason of an excusable cause of delay,²³ we find that the contract was properly terminated for default.

Respecting the excess costs incurred in effecting the repurchase, the contractor has not even alleged that in proceeding with the repurchase action the Government failed to mitigate damages; nor would an allegation to this effect have been entitled to serious consideration. The record shows that within eight days of the issuance of the default notice the contracting officer had awarded the replacement contract to Surveyors Service Co. in the amount of \$18,-

¹⁹ Item 7.

²⁰ Item 20.

²¹ Note 16, *supra*. We would be without authority to grant a price increase because of a mistake-in-bid in any event. See *Orndorff Construction Company, Inc.*, IBCA 372 (October 25, 1967), 74 I.D. 305, 356, 67-2 BCA par. 6665 at 30,926. Accord: *Ford Construction Co., Inc.*, AGBCA No. 252 (July 9, 1971), 71-2 BCA par. 8966. *John McShain, Inc.*, GSBGA No. 3431 (October 14, 1971), 71-2 BCA par. 9117. Cf. *Marmac Industries, Inc.*, ASBCA No. 11861 (July 14, 1970), 70-2 BCA par. 8421 (Board without authority to rescind contract on ground of mutual mistake).

²² See, however, *Truong Giang, et al.*, ASBCA No. 15278 (October 27, 1971), 71-2 BCA par. 9149; *California Bus Line*, ASBCA No. 16138 (October 20, 1971), 71-2 BCA par. 9157 at 42,466 ("* * * It has been long held that 'An obligation in terms of the currency of a country takes the risk of currency fluctuation and whether creditor or debtor profits by the change the law takes no account of it. * * *'") The Comptroller General has recently determined that a contractor was not entitled to relief for losses caused by cost increases in foreign-supplied materials after devaluation of the American dollar, because

the devaluation was attributable to the Government acting in its sovereign capacity and the Government is not liable as a contractor for the consequences of its acts as a sovereign. Dec. Comp. Gen. B-179255 (September 4, 1973), 19 CCF par. 82,502.

²³ *Auto-Control Laboratories, Inc.*, IBCA-424 (September 21, 1964), 1964-BCA par. 4453 (contractor's delay of 51 days in proceeding with contract performance pending decision by Comptroller General on mistake-in-bid claim found not to be excusable); *Hydro-Space Systems Corporation*, ASBCA No. 15275 (February 19, 1971), 71-1 BCA par. 8739 (default termination upheld where no exceptional circumstances present to take case out of rule that sovereign acts of general application do not create any special rights in favor of those contracting with the Government and the evidence of record failed to establish any causal relationship between the Government's fiscal policies and the appellant's failure to perform).

417.50; ²⁴ that such company offered equipment supplied by the same Swiss manufacturer the contractor had contemplated using; ²⁵ that the \$18,417.50 procurement cost was \$1,588.20 less than the total contract price of \$20,005.70 ²⁶ the contractor had requested prior to proceeding with contract performance. We therefore find that the excess procurement cost involved of \$1,678.90 ²⁷ is reasonable and properly assessable against the contractor.

Conclusion

The appeals docketed as IBCA-996-6-73 and IBCA-1003-8-73 are denied.

WILLIAM F. McCRAW, *Chairman.*

WE CONCUR:

SHERMAN P. KIMBALL, *Member.*

SPENCER T. NISSEN, *Member.*

FARRELL MINING COMPANY

3 IBMA 1

Decided *January 15, 1974*

Appeal by the Mining Enforcement and Safety Administration from an order of an Administrative Law Judge dismissing penalty proceedings filed pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.

Order vacated and proceeding remanded.

²⁴ Item 19; Appeal File II, Item 1.

²⁵ Item 4; Appeal File II, Item 1.

²⁶ Item 8.

²⁷ Appeal File II, Item 4.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge may not proceed under 43 CFR 4.512, unless a motion is filed which specifically seeks withdrawal or refers to the regulation.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge may not proceed under 43 CFR 4.588, unless the operator's waiver of hearing specifically requests a decision on the existing record.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Edmund J. Moriarty, Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY MR. DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Mining Enforcement and Safety Administration (MESA) appeals to the Board to vacate an Administrative Law Judge's dismissal of penalty proceedings in Docket No. DENV 73-105-P filed pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ The Judge dismissed the docket on June 20, 1973, relying upon 43 CFR 4.512, 36 F.R. 17338 (August 28, 1971).² For the reasons set forth below, we are obliged to vacate the

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² This regulation was amended on May 30, 1973; however, we need not consider the effect of the changes since, for reasons set forth hereafter, we do not regard the operator's letter as a withdrawal. See 38 F.R. 14170.

January 15, 1974

order of dismissal and remand the case for further proceedings.

I.

Procedural Background

The Farrell Mining Company petitioned the Hearings Division of the Office of Hearings and Appeals (OHA) for hearing and formal adjudication with respect to four alleged violations of the Act on November 21, 1972. Subsequently, on April 9, 1973, the Administrative Law Judge (Judge) assigned to this case vacated one of the four notices of violation and the related section 104(b) withdrawal order alleging a violation of 30 CFR 77.403. His disposition of that matter had the assent of MESA and has not been appealed.

On the same date, April 9, 1973, the Judge sent a letter to counsel for the operator which reads as follows:

I am enclosing an order that eliminates the alleged violation of Section 77.403 from the above proceeding. I would like to receive your thoughts as to whether the operator still desires a hearing and formal adjudication with respect to the remaining three alleged violations in this proceeding.

Counsel failed to reply and the Judge renewed his inquiry in another letter dated May 16, 1973, which states as follows:

I would appreciate receiving a response to my letter of April 9, 1973, inquiring as to whether the operator still desires a hearing and formal adjudication with respect to the remaining three alleged violations in this proceeding.

By letter dated May 24, 1973, and received May 29, 1973, counsel finally responded as follows:

In reply to your letter of May 16, 1973, this is to advise that the operator, Farrell, does not desire a hearing and formal adjudication with respect to the remaining three alleged violations in the captioned proceeding.

The Judge decided to construe counsel's above-quoted statement as a withdrawal of the petition for hearing and formal adjudication. On June 20, 1973, he issued an order granting withdrawal, dismissing the proceedings, and requiring subsequent disposition under 30 CFR part 100 as if no petition had ever been filed.

On July 9, 1973, MESA filed a timely notice of appeal, and, subsequently, on July 27, 1973, filed a timely brief. The operator has filed no brief and is therefore deemed to be resting on the Judge's order.

II.

Issue Presented on Appeal

Whether the Administrative Law Judge erred in dismissing the docket in reliance upon 43 CFR 4.512.

III.

Discussion

We are disturbed by the procedure followed by the Judge to bring the proceedings in this case to a conclusion. Leaving aside the propriety of the two above-quoted letters of inquiry initiated by the Judge to determine the operator's

litigating intentions, we believe that his construction of Farrell's May 24 reply letter as a withdrawal of pleadings pursuant to 43 CFR 4.512 was erroneous.³

Section 4.512 of Title 43 CFR provides as follows:

A party may withdraw a pleading at any stage of a proceeding without prejudice.

In the past, we have had two occasions to consider the construction and application of this regulation. In *Ranger Fuel Corporation*,⁴ the Board held that a "request for hearing," filed pursuant to 30 CFR part 100, 36 F.R. 780 (January 16, 1971), is not a "pleading" within the meaning of the regulation. In *United States Fuel Company*,⁵ the Board concluded that a "petition for hearing and formal adjudication," filed pursuant to 43 CFR 4.540, 37 F.R. 11461 (June 28, 1972), is a "pleading" and ruled that, although it may be withdrawn, the effect of the withdrawal is a discretionary matter for the initial determination of the Administrative Law Judge.

It is instructive to compare the papers seeking withdrawal in *Ranger Fuel* and *United States Fuel* with the subject letter in this case. In order to exercise its alleged rights under 43 CFR 4.512, counsel for

Ranger Fuel filed the following statement:

Pursuant to Section 4.512 of Title 43, CFR Ranger Fuel Corporation withdraws its request for hearing * * *

In *United States Fuel*, *supra*, the operator originally filed a motion to dismiss and, after a hearing with the Administrative Law Judge, submitted an amended motion specifically seeking withdrawal. The letter in the case at hand which the Judge construed as a withdrawal makes no specific reference to the regulation and does not even use the term "withdraw." In stating its desire not to press on with a hearing on the three alleged violations, the operator was at most waiving its right to a full evidentiary hearing. If Farrell was actually seeking to exercise its rights under 43 CFR 4.512, which is unclear, it failed to file a sufficiently precise motion. In this circumstance, we think the Judge exceeded his adjudicative function by construing what was actually filed to be a motion to withdraw.⁶

In providing for the right to a hearing under section 109 of the Act, Congress sought to assure that anyone subjected to penalty proceedings would be accorded ample due process of law. However, the fact that the right exists does not compel an operator to avail itself thereof. Indeed the Secretary's regulations specifically provide mechanisms for decisions without a full

³ We note in passing that even if the letter did constitute a withdrawal, that part of the Judge's order requiring further disposition under 30 CFR part 100 was legally precluded by the suspension of those regulations. See 38 F.R. 10086 (April 24, 1973).

⁴ 2 IBMA 186, 80 I.D. 604, CCH Employment Safety and Health Guide par. 16,541 (1973).

⁵ 2 IBMA 315, 80 I.D. 739, CCH Employment Safety and Health Guide par. 16,954 (1973).

⁶ See *Freeman Coal Mining Corporation*, 2 IBMA 197, 209-10, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973).

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evidentiary hearing. See 43 CFR 4.515, 4.544, 4.588 and 4.590. In such cases, of course, a sufficient record must otherwise be generated in order to support findings of fact and conclusions of law required by the Act.⁷

Under the regulations, the operator's letter waiving formal hearing was not sufficient to support summary dismissal. The rule which comes closest to supporting summary disposition is 43 CFR 4.588; however, inasmuch as Farrell did not specifically request a decision on the existing record as required by the regulation, there was and is no basis for proceeding under that rule. See generally *United Mine Workers of America, Local Union 1520, District 2 v. Rushton Mining Company*.⁸

Consequently, we have decided to vacate the order of dismissal and remand the case for further proceedings. If the operator decides to file a specific request for judgment on the existing record, the Judge may proceed under 43 CFR 4.588. If Farrell does not perfect its motion pursuant to that regulation, the Judge should treat the waiver as a nullity and proceed toward hearing. In the event that the operator fails to respond to further

orders issued by the Judge, summary disposition under the Secretary's default regulation would appear appropriate. 43 CFR 4.544.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the order of dismissal in the above-entitled docket IS VACATED and the case IS REMANDED for further proceedings consistent with this opinion.

DAVID DOANE, *Member*.

I CONCUR:

C. E. ROGERS, JR., *Chairman*.

ADMINISTRATIVE APPEAL OF
VILLA VALLERTO v.
MILDRED L. P. PATENCIO

2 IBIA 140

Decided January 16, 1974

Appeal from an administrative decision canceling long-term business lease.

Affirmed.

Indian Lands: Leases and Permits:
Long-term Business: Cancellation

Where a long-term business lease, approved by the Secretary, was negotiated by an Indian lessor, and where the lease includes the provision " * * * Lessor, at the sole option of the Lessor, may terminate this lease * * *" such lease may be canceled by the Secretary on behalf of

⁷ See *Kings Station Coal Corporation*, 2 IBMA 291, 301, n. 7, 80 I.D. 711, CCH Employment Safety and Health Guide par. 16,879 (1973).

⁸ 2 IBMA 39; 80 I.D. 653, CCH Employment Safety and Health Guide par. 15,465, *reconsideration denied*; 2 IBMA 55, 80 I.D. 655.

the lessor upon lessor's demand where the default is undisputed and the breach of covenant is material.

APPEARANCES: Donald N. Belveal, Attorney at Law, Newport Beach, California, for Villa Vallerto, a limited partnership and Howard T. Lane, general partner, appellant; Raymond C. Simpson, Attorney at Law, Long Beach, California, for Mildred L. P. Patencio, lessor; William M. Wirtz, Attorney at Law, Interior's Office of the Solicitor, Sacramento, California, for the Area Director and the Director of the Palm Springs Office of the Bureau of Indian Affairs, appellees.

OPINION BY MR. McKEE

*INTERIOR BOARD OF
INDIAN APPEALS*

This is an appeal from the Sacramento Area Director's June 25, 1973, order canceling lease PSL 139, Contract No. J53C14201756 covering a portion of Palm Springs, A1. No. 55, Mildred L. P. Patencio, lessor.

NOTICE IS HEREBY GIVEN: That a notice of appeal dated July 3, 1973, was timely filed by Villa Vallerto, a California limited partnership lessee, and the said appeal is hereby docketed under the above number.

By special delegation of authority this appeal addressed to the Area Director of the Sacramento Office of the Bureau of Indian Affairs, was transferred on September 14, 1973, by the Assistant Secretary of Interior to the Director, Office of Hearings and Appeals, for final determi-

nation. A copy of the delegation is attached as "Appendix A." A further general delegation of authority was issued August 6, 1973, by the Director to the Board of Indian Appeals as an ad hoc Board, attached as "Appendix B."

The Area Director's memorandum on appeal dated August 27, 1973, addressed to the Commissioner of the Bureau of Indian Affairs, is a part of the record transferred to the Board. Attached thereto is a copy of lease PSL-139 with amendments, and supplements. The Area Director's memorandum with 28 attached documents duly itemized constitutes the record in this matter.

The appeal involves the cancellation of a lease having a term of 65 years covering a portion of Palm Springs Allotment No. 55 held in trust by the United States for Mildred L. P. Patencio, an enrolled member of the Agua Caliente Band of Mission Indians. As is hereinafter discussed, the effective date of said lease is fixed as September 3, 1971. The lease consisting of a composite of several documents was approved by the Area Director of the Bureau of Indian Affairs under authority delegated by the Secretary of the Interior pursuant to the requirements of 25 CFR Part 131, with noted exceptions.

Beginning shortly after the end of the first year of the lease, successive notices of default were issued to the lessee by the Area Director at the request of the lessor. By registered letter of December 21, 1972, the Area Director gave notice of de-

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fault in performance of several provisions of the lease and specifically called attention to an impending default in performance of item 5 of the lease. A period of 30 days was allowed pursuant to 25 CFR 131.14 in which " * * * to cure the claimed default in rental payment and 60 days in which to correct all other violations." The 60-day period ended February 19, 1973.

Negotiations were undertaken to modify the terms of the lease to cure the defaults, but with the passage of time new defaults occurred. No new agreement was reached and there was no waiver of any default.

By registered mail notice of June 25, 1973, the Area Director canceled the lease upon the demand of the Indian lessor.

Item 5 of the lease entitled "Plans and Designs," as modified by Supplemental Agreement No. 1 dated July 30, 1971, required the appellant lessee to submit plans within " * * * One hundred eighty (180) days from the date of this approval, * * *" and provided that, " * * * said lease shall therefore become effective upon the date that Lessee signs the conditional approval of said lease which has been attached thereto and made a part thereof * * *." (*Italics supplied.*) The separate document attached, entitled "Approval of Supplemental Agreement No. 1," executed by the lessee acting by "Howard T. Lane, General Partner" is *undated*. However, the Area Director approved it on September 3, 1971, and

Mr. Lane, acting for the lessee acknowledged his signature before a notary public on September 17, 1971. It could be argued that September 17th should thus be considered the date " * * * that lessee signs * * *," and, therefore, the effective date of the lease. This would be true were it not for the statement made by appellant on pages 5 and 6 of its brief contending that the date of the Secretary's approval on September 3, 1971, is the effective date.

A finding is made that all of the signed documents taken together constitute a single contract having the effective date of September 3, 1971. The Area Director's contentions for the date of August 3, 1971, cannot be sustained.

The lessee admits that it did not comply with the provision in item 5, *as amended*, of the lease requiring the submission within 180 days after September 3, 1971, of a "preliminary general plan and design" for the development of three and one-half of the seven acres of the premises leased. By calculation the period ended at midnight on March 1, 1972, and default in performance of item 5 beginning March 2, 1972, has continued ever since. No tender of compliance has been offered, and none of the other requirements of item 5 has been met.

Lacking compliance with item 5, there could be no compliance with item 6 requiring the completion of improvements having a value of four hundred thousand dollars

(\$400,000) within one year of approval of the "general plan." Item 6 further includes the following provision, "* * * Lessor, at the sole option of the Lessor, may terminate this lease unless failure to complete said improvements is beyond the control of the Lessee." The lessee has not alleged compliance or averred that its failure to comply arose from a circumstance beyond its control.

The provision for cancellation in this lease is sufficient to distinguish it from the lease under consideration by the court in *Sessions, Inc. v. Rogers C. B. Morton, Secretary of Interior et al.*, 348 F. Supp. 694 (1972), which has no such provision. The court ruled there that since the Secretary was a party to the lease (he had approved the lease pursuant to 25 CFR 131.5(a)), he could not act unilaterally to effect its cancellation and that cancellation was subject only to the order of the court.

In the lease contract before us, the lessee agreed with the lessor in a bilateral contract that the discretion to cancel (albeit for cause) rested exclusively with the lessor. However, the Secretary in his trustee relationship to lessor exercised discretion in approving the lease in the first instance and again in ordering cancellation thereof for default. In the exercise of discretion, the Secretary was not bound to issue a cancellation decision upon a frivolous demand by the lessor, but upon demand made to do so for good cause, he had no choice other than to com-

ply. The record of default in performance by the lessee is clear and no unresolved material issue of fact requiring a hearing is presented.

A finding is made that on June 25, 1973, the appellant was in default in performance of the lease requirements set forth in both items 5 and 6, and that such default constituted a breach of material provisions of the lease.

A further finding is made that item 6 of the lease specifically reserved to the lessor the sole option to terminate the lease upon failure of lessee to perform its covenants.

Based upon such findings, a conclusion is reached that the Area Director acted in behalf of the lessor within his authority in the issuance of his decision canceling lease No. PSL-139 on June 25, 1973. The Area Director's decision should be affirmed.

Upon the finding that the provisions of the various documents taken together constitute one lease contract, which was terminated by cancellation, it is concluded that the provision therein giving the lessee an option to purchase was terminated. The lessee had no further right remaining after issuance of the Area Director's order of cancellation.

A finding is made, upon the establishment of September 3, 1971, as the effective date of the lease, that the record of rental payments is not sufficiently clear to support a finding of default in payment or rental. There is no apparent dispute between the parties as to the amount

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of the payments which have actually been made. The only dispute is as to the application of the payments. The rental due between September 3, 1971, and the June 25, 1973, cancellation, can be calculated. The deficiency, if any, can be determined and collected from the lessee's cash bond.

The record is also deficient in that it omits any specification of alleged default in the payment of taxes, and no finding of default is made here.

The Indian lessor has at all times refused to consent to the suspension of the cancellation pending disposition of this appeal.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and by Appendixes "A" and "B" hereto, it is ORDERED that the action of the Area Director in in canceling the lease is affirmed.

IT IS FURTHER ORDERED that the lessor was and is entitled to immediate possession of the leasehold.

A copy of this decision is mailed by certified mail, return receipt requested, this date to:

Mr. Donald N. Belveal
Attorney at Law
Suite 12, 881 Dover Drive
Newport Beach, CA. 92660

Villa Vallerto and
Mr. Howard T. Lane
Suite 5, 410 So. Euclid St.
Anaheim, CA. 92801

Mr. Raymond C. Simpson
Attorney at Law
Suite 406, Security Bank Building
Long Beach, CA. 90802

Mrs. Mildred L. P. Patencio
855 Mel Ave.

Palm Springs, CA. 92262

Mr. William M. Wirtz, Attorney

Department of the Interior

Office of the Solicitor

2800 Cottage Way

Sacramento, CA. 95825

Mr. William E. Finale, Area Director

Bureau of Indian Affairs

Room W-2550, 2800 Cottage Way

Sacramento, CA. 95825

Mr. Richard S. McDermott, Director

Bureau of Indian Affairs Office

587 South Palm Canyon Drive

Palm Springs, CA. 92262

This decision is final for the Department.

DAVID J. McKEE, *Chairman.*

WE CONCUR:

ALEXANDER H. WILSON, *Member.*

MITCHELL J. SABAGH, *Member.*

APPENDIX A

September 14, 1973

MEMORANDUM

To: Director, Office of Hearings and Appeals

From: For the Assistant to the Secretary of the Interior

SUBJECT: Appeal by Villa Vallerto from the Sacramento Area Director's Cancellation of Palm Springs Lease No. 139

Enclosed for handling by your office is the case file in the subject matter as submitted by the Area Director's letter of August 27, 1973.

The lease was canceled for cause on June 25, 1973.

It is noted that the Area Director recommends that the lease cancellation be suspended during the pendency of the appeal. If this is done, it appears that such action would restore the lessee's option to purchase under Article 38 of the lease. We are, therefore, asking the Area Director to ascertain the Indian landowner's wishes in this regard and to accordingly advise your office.

Please await further word from the Area Director before acting on the proposed suspension.

T. W. TAYLOR

APPENDIX B

August 6, 1973

MEMORANDUM

To: Chairman, Board of Indian Affairs

FROM: Director

SUBJECT: Delegation of Authority

Pursuant to the authority of the Director, Office of Hearings and Appeals, to appoint Ad Hoc Boards of Appeal, 43 CFR 4.1(5), the Board of Indian Appeals is hereby authorized to consider and rule upon appeals from decisions of officials of the Bureau of Indian Affairs and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for the complete adjudication of the is-

sues. This ad hoc authority shall remain in force and effect until the Board's authority to hear such appeals is published in the Federal Register.

JAMES M. DAY, *Director.*

UNITED STATES v. ELMER M. SWANSON

14 IBLA 158

Decided January 16, 1974

Appeal from a decision of Administrative Law Judge Robert W. Mesch¹ holding three mining claims null and void and dismissing a complaint against seven millsite claims. (Contests: Idaho 1347, Idaho 4090.)

Affirmed in part; reversed in part.

Mining Claims: Discovery: Generally

To constitute a discovery on a lode mining claim there must be an exposure on the claim of a lode or vein bearing mineral which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Discovery: Generally

Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

Mining Claims: Millsites

A millsite claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than

¹ The title "Administrative Law Judge" replaced that of "Hearing Examiner" by order of the Civil Service Commission, 37 F.R. 18787 (August 19, 1972).

January 16, 1974

five acres. There is nothing within the relevant statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The reference to five acres within the relevant statute is a maximum, not an absolute, automatic grant.

Mining Claims: Millsites

A millsite claimant, when challenged by the Government, must demonstrate use or occupation of all the area claimed within each millsite location before he will be granted a patent for the full amount requested. That area which is not proved to be needed for mining and milling purposes may not go to patent.

Act of August 22, 1972—Millsites: Patents—Millsites: Issuance—Mining Claims: Patent.

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Valid millsite claims situated within the recreation area may not go to patent, but such result does not prevent or interfere with the full exercise of a claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located.

APPEARANCES: James C. Herndon, Esq., Salmon, Idaho, for contestee; Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for contestant.

OPINION BY MR. RITVO

INTERIOR BOARD OF LAND APPEALS

Elmer M. Swanson has appealed to the Secretary of the Interior

from a decision dated March 7, 1973, by Administrative Law Judge Robert W. Mesch, insofar as it held the Rex, Zee and Zenna lode mining claims null and void. The Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from the same decision insofar as it dismissed the complaint challenging the validity of the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle, and Deadwood millsites.

At the request of the Forest Service, the Idaho State Office, Bureau of Land Management, issued complaints challenging the validity of the above three lode mining claims and seven millsites. The two contests were consolidated for purposes of convenience and a hearing was held on July 11 and 12, 1972, at Salmon, Idaho.

Aside from Swanson being the contestee in both complaints, there is no relationship between the lode mining claims and the millsites. They will be treated separately in this opinion. The mining claims will be considered first.

Mining Claims

The Rex, Zee and Zenna lode mining claims are located in secs. 9 and 10, T. 9N., R. 17 E., B.M., Custer County, Idaho, Challis National Forest.² The Zee and Zenna claims were located in October of 1967, and the Rex claim was located in March of 1968.

² The Rex and Zee lode claims and the seven millsites are all embraced within the boundaries of the Sawtooth National Recreation Area, established by the Act of August 22, 1972, Public Law 92-400, 86 Stat. 612.

The contest against these claims was filed on April 15, 1971. The complaint charged:

1. The land embraced within the limits of the claims is nonmineral in character.

2. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

3. The claims are not being held in good faith for bona fide mining purposes.

The evidence indicated that there were no workings or improvements on the claims other than a road that crosses the three claims. The road was constructed in 1969 by Swanson allegedly to provide access to potential drill sites on the claims. No drilling was ever done and the road has served as a convenient access to the contested millsites owned by the contestee.

The Government's witnesses testified that they had examined the claims, taken and analyzed samples, and the results of their examination did not show minerals of any significant value. Vernon T. Dow, a mining engineer for the Forest Service, expressed the opinion that a person of ordinary prudence would not be justified in the expenditure of time and money to develop the claims, nor even to further explore the claims. (Tr. 42, 43, 44.) Ed Barnes, a mining engineer for the Bureau of Land Management, testified that he could find no mineral deposits that would warrant development of the claims. (Tr. 61.)

The contestee testified that his spectographic analysis of the claims indicated appreciable amounts of

various minerals. (Tr. 77.) He stated that in 1969 he drove 4500 feet through the claims making a cut for a road in order to bring in a drilling machine, but was unable, as yet, to obtain the services of someone to drill the claims. (Tr. 70, 72.)

Following the hearing, a post-hearing brief was submitted by the contestee. It reads, in pertinent part:

* * * he does not come before the Hearing Examiner and seriously contend that there is sufficient mineral present to warrant further development. However, Contestee wants it clearly understood by the Hearing Examiner that at the time he located the claims he did so in good faith and that it was not until further work was done on the claims that there was an indication to him that perhaps mineral was not in sufficient quantities to warrant further development. (Brief at 2.)

* * * At this time Mr. Swanson does not urge that the mineral found to date on the three claims passes the reasonable prudent-man test. However, the Contestee points out that the evidence clearly shows that he acted prudently at the time he discovered the claims and that he acted as a reasonable and prudent miner would. He also urges that it is clear that a roadway across the three claims was the best access to the high country beyond, for everyone concerned * * * . (Brief at 4.)

After reviewing the complete record, the Judge concluded that valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws. Accordingly, the mining claims were declared null and void.

On appeal, the contestee asserts that the Administrative Law Judge

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incorrectly applied the prudent man test to the facts presented at the hearing. While Swanson concedes that the surface mineralization itself does not warrant additional development, he argues that there was sufficient mineralization to justify further exploration by core-drilling on the claims:

The point that the Contestee makes on appeal is that a minor (sic) would be considered reasonable and prudent in core-drilling the property. The fact that the reasonable, prudent minor (sic) test was limited only to surface discovery is in error. (Statement of Reasons at 2.)

This argument is without merit as the Administrative Law Judge applied the correct test. The standard applied by the Department of the Interior to determine the validity of mining claims is well established. To constitute a discovery upon a lode mining claim there must be an exposure on the claim of a lode or vein bearing mineral which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599, 602 (1968).

Appellant is basically arguing that the mineralization exposed on the surface of the claims justifies further exploration to determine whether a valuable mineral deposit exists. This does not constitute a discovery. In *United States v. Gendolfo*, 9 IBLA 204, 207 (1973), the Board stated:

*** Evidence of mineralization which may justify further exploration in hope of finding a valuable mineral deposit is not synonymous with evidence of mineralization which will justify the expenditure of labor and money with a reasonable prospect of success in developing a valuable mine. Only the latter constitutes discovery. *Henault Mining Company v. Tysk*, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); *United States of America v. Charles W. and Cora A. Kohl*, 5 IBLA 298 (1972); *United States v. New Mexico Mines, Inc.*, 3 IBLA 101 (1971); *Marvel Mining Co. v. Sinclair Oil and Gas Co., et al.*, 75 I.D. 407 (1968).

The evidence clearly demonstrated that mineralization exposed on the mining claims did not warrant development. Accordingly, the Judge's conclusion that valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery was correct, and the Rex, Zee and Zenna lode mining claims were properly declared null and void.

Millsites

The High Tariff, Clara, Little Falls, Livingston, May, Trensvalle and Deadwood millsites are located in approximate secs. 1 and 12, unsurveyed T. 9N., R. 16 E., B.M., Custer County, Idaho. They are situated on both sides of Jim Creek just above its confluence with Big Boulder Creek in the Challis National Forest. The millsites are contiguous and each contains five acres of land. They were located on November 8, 1967, in connection with

seven patented lode mining claims bearing the same names as the millsites. All seven are now being used to some degree in connection with the patented lode mining claims known as the Livingston Mine.

On April 21, 1967, Elmer Swanson filed an application for a patent covering the millsites. On April 9, 1968, the Government initiated a contest against this patent application. In its complaint, the Government charged:

1. The said mill sites are not being used for bona fide mining or milling purposes.

2. The said mill sites are not being used for nor occupied by a mill or reduction works nor associated facilities.

3. All said mill sites are not laid out in as regular a form as reasonably practicable.

At the hearing, the Government's witnesses testified that they had not seen any milling or mining operations on the millsites until the time of the hearing. Marvin Larson, former District Forest Ranger, stated that during his estimated 50 visits to the millsites between 1958 and 1969, he did not see any milling or mining operations. (Tr. 99.) Dan Pence, District Forest Ranger since 1969, testified that he never saw any use being made of these claims for mining or milling purposes. (Tr. 119.) Both men testified that the sites had been used for other purposes such as the rental cabins, horses, and shower facilities, and the sale of candy, postcards, and gasoline. (Tr. 100, 103, 120.)

Swanson testified that he and other workmen had for many years lived on the millsites while work

was being done to recondition the Livingston Mine and stockpile ore from the mine onto the millsites. (Tr. 108, 109.) On April 24, 1972, after initiation of this contest but before the hearing, Swanson entered into a lease-purchase agreement with Mine Developers, Inc., an experienced mining concern. In April of 1972, the company sent a crew of men to the property to work on the mill and other facilities on the millsites. Swanson testified that under this agreement the Livingston Mine and the seven millsites are presently being operated for mining and milling purposes (Tr. 183, 198.)

Both sides gave further testimony regarding the quantum of land being used for mining and milling purposes. This testimony will be discussed below.

In his decision, the Judge gave the following description of the millsites:

The individual mill sites contain the following improvements and/or have been put to the following uses:

High Tariff:

Manager's house, assay office, office, bunkhouse, two storage buildings, a school, two unidentified buildings, and connecting roadways.

Clara:

Eight separate structures identified as living quarters, an unidentified building and connecting roadways.

Little Falls:

Five separate structures identified as living quarters, storage of ore and connecting roadways.

Livingston:

One structure identified as living quarters, storage of ore, a bridge and connecting roadways.

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May:

Tailings pond, storage of ore and connecting roadways.

Trensvale:

Ball and flotation mill, crusher, shop, tank, tailings pond, storage of ore and connecting roadways.

Deadwood:

Tailings pond and connecting roadways.

After reviewing the record, Judge Mesch concluded:

I find that the High Tariff, Clara and Little Falls mill sites are valid. I am not willing, however, to conclude that the Livingston, May, Trensvale, and Deadwood mill sites are valid with respect to all of the land included within the mill sites. The evidence presented by the Forest Service does not support the assertion that more land is included within these four mill sites than is necessary for the storage of ore. However, the evidence as a whole is not adequate to sustain the conclusion that all of the land within the four mill sites is necessary for mining or milling operations.

Having made this finding, the Judge then ordered that the complaint challenging the validity of the seven millsites be dismissed because the evidence did not support the Government's allegations in the complaint.

On appeal, the Government contends generally that the Administrative Law Judge's decision was incorrect in the following respects: (1) in finding that the millsites were productive, used for bona fide mining and milling purposes, and not held for speculative use; (2) in concluding that the Government had not demonstrated that more land was located than actually needed for mining and milling

operations; (3) in not making a finding that, even if the claims were valid, they could not be patented since they were situated within the Sawtooth National Recreation Area.

Patenting nonmineral lands as millsites is authorized by 30 U.S.C. § 42 (1971). The portion of section 42 here applicable reads as follows:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres.
* * *

The first question presented centers on whether Swanson has sufficiently complied with the law's requirement that the lands be "used or occupied * * * for mining or milling purposes." In *Charles Lenig*, 5 L.D. 190, 192 (1886), the Department enlarged upon the statutory language:

The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz-mill or reduction-works upon it, or when in any

other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be *using* it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

The Government contends that Swanson has not met the test set out in *Lennig* in that there was no productive use of the millsites for mining or milling purposes. We do not agree with this contention. While there was testimony indicating that various non-mining activities were being engaged in and that only a minor amount of ore had been withdrawn from the Livingston Mine, there was still adequate evidence of mining and storage activity demonstrating good faith use and occupation for mining and milling purposes.

Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning

the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entered into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production. The Judge concluded, and we agree, that the evidence demonstrated a good faith intention to use *some* of the land within the contested millsites for mining and milling purposes.

The major problem in this case revolves around the Government's second contention that more land was located than actually needed for mining and milling purposes. The Government argues that a millsite claimant can only locate and patent land which is reasonably necessary for use in his mining and milling operation. Swanson is accused of having laid out his claims in an improper form in that he has not attempted to make economical use of public land in such a way as to take the minimum required amount necessary for his operation.

In the case of *Hard Cash and Other Mill Site Claims*, 34 L.D. 325, 327-328 (1905), the Department said:

* * * It was stated in *Alaska Copper Company* case, *supra*, p. 130, that "whilst no fixed rule can well be established, it seems plain that ordinarily one mill-site affords abundant facility for the promotion of mining operations upon a single body of lode claims." It follows that if more than one mill-site is applied for in

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connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill-sites in this case, where there is nothing to show but that the area embraced in one of them would be ample for such storage, is but a mere colorable use of the mill-sites, which does not satisfy the requirements of the statute.

Hard Cash indicates the strictness of scrutiny which will be given to applications for multiple mill-sites. The decision signifies that use and occupancy of land in excess of one millsite, even for a group of lode claims, will be allowed only insofar as the applicant is able to show a reasonable need for all the lands claimed.

In this instance, the Government is not looking to invalidate all but one millsite. Rather, the Government has charged in its complaint that all of the millsites are not laid out in as regular a form as reasonably practicable in that certain mill-sites, or portions of them, are not required for the contestee's operation.

In *J. B. Hoggins*, 2 L.D. 755 (1884), the Secretary ruled on a case wherein the claimant had attempted to patent two pieces of land as millsites, one of $4\frac{1}{2}$ acres, another of $\frac{1}{2}$ acre, in conjunction with a patent for a lode mining claim. The Commissioner had ruled that the claimant had to choose between which of the two sites it wished to use, but could not use both. The Secretary overruled this decision and held that since the amount in both locations did not exceed the five-acre

maximum, both millsites should be permitted to stand. What is worth noting is the closing paragraph within the decision at 756:

I may add that in some instances it might be necessary for the proprietor of the vein or lode to use or occupy only one piece of nonadjacent surface ground for mining or milling purposes, and in other instances more than one piece might be quite necessary and proper. I think the practice under said section should be to allow the entry of such number of pieces, within the restriction of five acres, as may appear to be necessary for such mining and milling purposes.

The Secretary's interpretation of how the statute should be administered clearly indicates that a claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. Furthermore, there is nothing within the statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The statute states that the location shall not "exceed five acres." *Webster's New World Dictionary*, College Edition (1973) defines *exceed* as follows: "to go or be beyond (a limit, limiting regulation, measure, etc.) * * *." The reference to five acres in the statute is clearly a ceiling measure, not an absolute, automatic grant.

We believe that in granting a gratuity of a millsite the Government is entitled to require efficient usage, so that only the minimum land needed is taken. All other land can then be

retained by the Government to be used for public purposes rather than for possible non-mining use.

The Board concludes that the law requires a claimant, when challenged by the Government, to demonstrate use or occupation of all the area claimed within a millsite location before he will be granted a patent for the full amount requested. That area which is not proved to be needed for milling and mining purposes may not go to patent.

In the case at hand, the evidence indicated, and the Judge so concluded, that the claimant had not demonstrated that he needed all of the land area for mining and milling operations.³ Despite this finding, the Judge dismissed the complaint, apparently due to the Judge's belief that the Government had not adequately demonstrated that more land is included within the millsites than needed for storage of ore.

The Judge apparently limited the thrust of the third charge to the question of whether the four easterly claims contained more land than is necessary for the storage of ore. The Judge seems to have meant that the claims included no more land best suited for storage than necessary. He did not imply that all of the land in these claims was necessary for storage. The record makes it plain that only part of these claims is needed for that purpose. Contestee's witness testified that only five acres would provide storage for the maximum amount that would be held on the claims and

for maneuvering of trucks and loaders (Tr. 215, 216) while the four claims cover 20 acres.

We read the third charge more broadly. It includes the general allegation that the claims were laid out to cover more land than was needed for any legitimate mining and milling purpose. The Government's emphasis on storage of ore arose naturally from the fact that this was the only use attributed to the portions of the claims not used for housing and administration (the three westerly claims and a small part of the Livingston) or for the mill (the northern third of the Trensvalle and a tiny bit of the Deadwood). Thus, even if we assume that five acres is necessary for storage of ore and no more than that for the mill, crusher and shop, there is still some seven to ten acres in the four easterly claims to which no usage can be assigned.

The Government's witnesses testified that more land was being used than was needed for mining and milling purposes. Larson testified that in 1967, he discussed with Swanson the patentability of the area south of Jim Creek on the Livingston, May, Trensvalle and Deadwood millsites. He pointed out to Swanson that about nine acres covered with Douglas fir timber were not being used for mining or milling purposes and that the Government would object to that part of the millsites going to patent. (Tr. 126.) Larson stated that Swanson later reacted to this warning by clearing the trees off the area and stor-

³ See Judge's conclusion quoted in the text, *supra*.

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ing small quantities of ore on all the sites. (Tr. 127.)

Dow described the storage of the ore as laid out in several different rows, all of which could have been put on any one of the millsites. (Tr. 134.) He concluded that given normal production, all that would be needed was some areas north of Jim Creek for mill, tailings and storage. (Tr. 135.) On cross-examination, Dow did testify that the millsites proposed for storage by the claimant would be more economical to use than alternative, unrelated millsites owned by Swanson. (Tr. 227.) He did not suggest, however, that all of the millsites in dispute were needed for storage.

To be more explicit, we may examine the particulars of the millsite claims.

First, several general observations may be helpful. A strip of forested land lies along the southern portion of these claims, approximately 100 feet by at least 600 feet. (Tr. 216.) The contestee does not plan to use that area for storage. (Tr. 216, 217.) The creek known as Jim Creek, cuts across the claims in a northwesterly direction, from about 200 feet north of the southeast corner of the Deadwood, the most easterly claim, through the center of the Livingston, the central claim of the seven, to about 150 feet south of the northeast corner of the High Tariff, the most westerly claim. Swanson's witnesses testified that the best area for storage lay in that part of the four easterly claims south of Jim Creek. (Tr. 170, 213,

214, 220, 221.) One estimated that there were five acres running through these claims between the creek on the north and the timber on the south. (Tr. 215-217.) While the area south of Jim Creek may be the most desirable storage area, other parts of the claims are also suitable for storage. (Tr. 134, 136, 139, 204.)

Going from west to east, we note that the High Tariff, Clara, and Little Falls millsites have a total of thirteen structures identified as living quarters. Additionally, there is a bunkhouse and manager's house on the High Tariff. The contestee gave no indication that all of these quarters would be needed for his operation. (Tr. 109, 110.) Furthermore, Dow testified that the Clara and High Tariff millsites would be sufficient for men's quarters and offices. (Tr. 135.)

Most of the structures on the three westerly claims are situated within the middle sections of the claims. We note that practically all of the southern portions are covered with timber with also a scattering of wooded area in the northern one-third sections. No mining or milling purposes have been assigned to these areas. (Tr. 216, 217.)

Moving east to the Livingston millsite we find one structure identified as living quarters situated in the center of the claim a short distance from its western boundary. The only other use is storage on a small area in its southeastern part. Jim Creek divides the Livingston into approximately equal northern and

southern halves. The cabin referred to above is also in the southern half. What use then is to be attributed to the northern part of this millsite?

Next, comes the May, the first of three sites measuring 217.8 feet from east to west and 1000 feet from north to south. Only the southern third lies south of Jim Creek. The northern third might be necessary as a maneuver area for the mill complex situated to the east on the Trensvalle, but as the record reveals, the center portion of the claim has been assigned no function.

Next, comes the Trensvalle. Its northern third contains mill buildings. Again not more than a third lies south of Jim Creek. Part of the center is occupied by a tailings pond, which is unsuitable for ore storage. Thus the center third of the claim has no purpose. (Tr. 212.)

The east claim is the Deadwood. No more than a quarter of it lies south of Jim Creek. Its center is covered by part of the old tailings pond which begins on the Trensvalle, and is unsuited for storage. Its westerly boundary runs through the extreme northeast corner of the crusher. Thus, moving the claim line ten feet or so to the east would have put the entire building in the Trensvalle claim. (Ex. 7.) Again, there is a large area of the claim to which no mining and milling purpose can be assigned.

Thus, we can only conclude that the record demonstrates that these seven claims encompass an area substantially in excess of what is

needed for mining and milling purposes.

The appellant's witnesses did not offer evidence justifying usage of all of the areas covered by the mill-sites.

Lawrence Baker, a mill operator at the Livingston mine and witness for the claimant, testified on direct examination that in his opinion all of the land claimed would be used for storage. (Tr. 173.) However, on cross-examination he admitted that the ore was not presently being stored in an efficient and economical manner in that it would be preferable to push it up high and consolidate the ore rather than let it lay out in long, low strips. (Tr. 180.)

Frank Taft, a mining engineer employed by Mine Developers, Inc., testified that the most suitable area for storage would be the land below Jim Creek and that a large portion of the four easterly claims would be required. (Tr. 214.) On cross-examination Taft stated that his opinion was based upon an estimation that 60,000 tons of ore would be stored on the sites. (Tr. 219.) He then admitted that 30,000 tons would be a more reasonable figure, thus cutting in half the "portion" required for storage. (Tr. 220.)

The Department has held that a millsite is a location under the mining laws of the United States subject to the same procedural requirements as mining locations. *Eagle Peak Copper Mining Co.*, 54 I.D. 251, 253 (1933); *James W. Nicol*, 44 L.D. 197, 199 (1915). Where, as here, the claimant's compliance

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with the applicable law is challenged by the Government and a prima facie showing is made that the claims are invalid, the burden then shifts to the appellant to show by a preponderance of the evidence that the claims are valid. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States v. Murer*, 4 IBLA 242, 244 (1972); *United States v. S.M.P. Mining Co.*, 67 I.D. 141, 144 (1960). The appellant has not met its burden as to these seven claims.

It is the conclusion of the Board that the appellant has failed to sustain the burden of showing such present occupation or use of the seven millsites, as now located, as would satisfy the requirements of the statute. Accordingly, the Judge's decision insofar as it dismissed the complaint with respect to the seven millsites is set aside. While all of the claims may not be held valid as presently located, we do not believe that they should be invalidated *in toto* since there are areas within each of the millsites that have been used or occupied for mining and milling purposes. Neither do we deem it feasible to select the millsite areas that the contestee may properly retain. The contestee is therefore allowed 90 days from receipt of this decision within which to amend his millsite locations to bring them into compliance with the law as we have discussed it. See *United States v. Guidoni*, A-30414 (October 28, 1965).

If he does so, but the Forest Service deems the new locations still not

to be in accordance with the views expressed herein, it may submit its views to this Board.

If he does not amend his locations, the Forest Service will submit to this Board its recommendations describing which parts of the claims should be held invalid. The Board will then issue a final decision.

All documents are to be served upon the adverse party in accordance with the Board's rules of practice.

As to the Government's third contention that no patents may be granted on appellant's valid millsite claims because they are located within the Sawtooth National Recreation Area, we must agree. The Act creating this recreation area provides in section 12 that:

Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.

(Act of August 22, 1972, 86 Stat. 615.)

Appellant argues that section 12 was not meant to have a retroactive effect but was only intended to apply to patent applications made after the enactment period. As appellant's millsites were located and challenged prior to the enactment of the Act, appellant claims that the section does not apply to his claims.

Appellant's interpretation of section 12 is incorrect.⁴ Congress in-

⁴ While section 12 was intended to extinguish the right of existing claim holders to proceed to patent on any claim within the recreation area, section 10 of the Act with-

tended that this section should, in fact, preclude the issuance of patents to claimants holding valid, existing interests prior to enactment of the Act. In describing the impact of section 12, Representative Roy A. Taylor, member of the Committee on Interior and Insular Affairs and Chairman of the National Parks and Recreation Subcommittee stated:

As I have pointed out, any person holding a valid claim is entitled to proceed to patent and thereby acquire fee title to the lands involved. Section 12, in effect, extinguishes that right with respect to lands located within the recreation area. While this probably creates a right to some compensation, its value may not be too significant since the right to prospect, develop, and mine the claim is protected by the terms of the bill.

(Congressional Record, H. 325, Jan. 26, 1972.)

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Accordingly, those millsite claims of the contestee subsequently found to be valid may not go to patent. This conclusion, however, should not be construed as preventing or interfering with the full exercise of the claimant's right to further work and develop his valid millsite claims subject to compliance with the rules

draws the land from future mining claims:

"Subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry and patent under the mining laws of the United States." (Act of August 22, 1972, 86 Stat. 612.)

and regulations covering federal land on which such claims are located.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed with respect to the Rex, Zee and Zenna lode mining claims. The decision is reversed with respect to the High Tariff, Clara, Little Falls, Livingston, Deadwood, Trensvalle and May millsites and remanded for action consistent with the views expressed herein.

MARTIN RITVO, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, *Member*.

HERMAN A. KELLER

14 IBLA 188

Decided *January 17, 1974*

Appeal from a decision of the Montana State Office, Bureau of Land Management, canceling a simultaneous drawing from which a qualified card has been omitted, and determining lease priority on the basis of a new drawing which included all qualified cards.

Affirmed.

Oil and Gas Leases: Applications: Drawings

The protest of a successful drawee at a drawing of simultaneously filed oil and gas lease offers against the cancellation

of that drawing because one offer had been erroneously omitted from it, and against the holding of a second drawing with all offers participating is properly denied.

Oil and Gas Leases: Bona Fide Purchaser

In order to invoke the bona fide purchaser protection afforded by the Act of September 21, 1959, 73 Stat. 571, *as amended*, 30 U.S.C. § 184(h) (1970), as regards an oil and gas lease, the lease must have issued; until execution and issuance of the lease, only an offer exists and the assignment of rights in such an offer is without the purview of the bona fide purchaser provisions in the Mineral Leasing Act.

APPEARANCES: Norman J. Pollock, Esq., of Pollock, Meyers & Eicksteadt, Marengo, Illinois, for appellant Herman A. Keller; LaVern C. Neff, Esq., of Bjella & Jestrab, Williston, North Dakota, for appellee Rae Ann Rossland.

OPINION BY MR. HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Herman A. Keller appeals from the decision of the Montana State Office, dated April 13, 1973, vacating the simultaneous oil and gas leasing drawing held on March 5, 1973, at which his drawing entry card for Parcel No. 58, was given priority and on the basis of a subsequent drawing held April 2, 1973, awarding priority to one Rae Ann Rossland. The State Office action was the result of a discovery, on March 27, 1973, that an entry card

for that parcel had not been included in the March 5, 1973, drawing. The State Office decision cited *R. E. Puckett*, A-30419 (October 29, 1965) as authority for its action.

On appeal appellant argues two points. First, he contends that the passage of time from the original drawing to the discovery of the excluded entry card in the instant case is so much greater than that which occurred in *R. E. Puckett*, *supra*, that the latter case cannot be said to control the disposition of this appeal. While we recognize that appellant's contention is not without some validity, we cannot agree that the greater length of time manifested in this case is sufficient to remove the case from the ambit of the general rule. *Puckett* is merely one of many cases which stand for the proposition that if an entry card is excluded from a simultaneous drawing that drawing is void and a new drawing, with all of the cards included, must be held. *See e.g.*, *Craig Martin*, 6 IBLA 37 (1972); *R. Donald Jones*, A-29631 (November 4, 1963); *Max H. Christensen*, A-29703 (September 17, 1963); *John H. Anderson*, 67 I.D. 209 (1960). In the instant case the drawing occurred on March 5, 1973.

It appears that the Montana State Office retains the envelopes received during the simultaneous filing period for not less than one month. On March 27, 1973, an employee of the office, while searching through the February envelopes for unusual stamps, prior to destruction of the envelopes, discovered the entry card

481-1878 of Mesa Verde Oil Company for Parcel #58, together with the requisite remittances for payment of filing fee and of advance rental. The card was with an envelope received February 26, 1973, at 10 a.m. The State Office determined that the Mesa Verde card had been timely received for the February simultaneous procedures but inadvertently had not been separated from its transmittal envelope and so improperly had been excluded from the drawing held March 5, 1973. Thereupon, on April 12, 1973, the State Office proceeded to hold a new drawing for Parcel #58, including all the qualified drawing entry cards. Certainly, increased diligence on the part of the State Office personnel would have avoided any of these problems, but the fact that the discovery of the omission took 22 days in the case at bar as opposed to the three days which elapsed in the *Puckett* case does not vitiate the need for a new drawing in which all parties are given an opportunity to participate.

As a subsidiary argument to this first point, appellant complains of the failure of the State Office to notify him of the intended redrawing until after it had occurred. He notes that in *John L. O'Brien*, A-30416 (April 8, 1965), the Department held that there is no need to conduct a new drawing after the discovery of an entry card excluded therefrom when the excluded offeror withdraws his offer in advance of the new drawing. Appellant con-

tends that had he been aware of the impending redrawing he would have entered into negotiations with Mesa Verde Oil Company in an attempt to convince it to withdraw its offer. While we perceive no barrier to an early notification of the successful drawee of a scheduled redrawing, appellant points to no regulation that would require the State Office to so act. While such a course of conduct might be justifiable, we cannot say that it is required.

The appellant's second contention is that a 50 percent interest in the lease had been assigned to one H. G. Klotz and that under the provisions of the Act of September 21, 1959, 73 Stat. 571, *as amended*, 30 U.S.C. § 184(h) (1970), Klotz is a bona fide purchaser whose interest cannot be terminated. The short answer to this argument is that no lease having been issued, the Act of September 21, 1959, *supra*, does not apply in the instant case. The Act provides in relevant part:

The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or permit which lease, interest, option, or permit was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired, or of his predecessor in title (including the original lessee of the United States) may have been can-

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celed or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. * * * (Italics added.)

30 U.S.C. § 184(h) (2).

Appellant attempts to argue that notwithstanding the fact that no lease ever issued to him, Klotz purchased an "option to acquire a lease or an interest therein," and thus should be afforded the protection of bona fide purchaser status. We do not agree. The phrase "option to acquire a lease" presupposes the existence of the lease. Until the lease issues all appellant was possessed of was the right to be accorded priority if the lease issued, *all other things being regular*. See e.g., *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973); *Schraier v. Hickel*, 419 F.2d 663 (D.C. Cir. 1969). It is precisely because the drawing was not regular that it was canceled. And it was the *drawing* that was canceled, not an existing *lease*.

Appellant has not cited any court decisions in support of his position. Nor are we aware of any. On the contrary, in an analogous case the United States Supreme Court held that bona fide purchaser protection was not available to those who acquired interests in entries under the Timber and Stone Act, unless patent subsequently issued. *Hawley v. Diller*, 178 U.S. 476, 485-490 (1900); *United States v. Detroit Timber and Lumber Co.*, 200 U.S. 321 (1906). In *Southwestern Petroleum Corp. v. Udall*, 361 F. 2d 650 (10th Cir.

1966) the United States Court of Appeals discussed the Congressional purpose animating the bona fide purchaser provision of the Mineral Leasing Act noting that "[i]t was imposed upon the great mass of diverse transactions with an infinite variation of facts which had taken place in the *issuance and assignment of federal oil and gas leases*." (Italic added.) *Id.* at 654. Congressional concern was focused on actions occurring at issuance of a lease and subsequent thereto, not at actions occurring prior to the issuance of a lease. We conclude, therefore, that the Act of September 21, 1959, *supra*, is not applicable in the case before us.

Because of the omission of a qualified drawing entry card, it was necessary to cancel the original drawing for Parcel #58, which chose the offer of Herman A. Keller for consideration. Random selection of the offer of Rae Ann Rossland from *all* offers timely filed was in accordance with long-standing Departmental policy.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES,
Member.

WE CONCUR:

MARTIN RITVO, Member.

ANNE POINDEXTER LEWIS, Member.

**ESTATE OF ARTHUR C. W. BOWEN,
DECEASED AND SUPERIOR PER-
LITE MINES, INC.**

OPINION BY MR. STUEBING

*INTERIOR BOARD OF
LAND APPEALS*

14 IBLA 201

Decided January 22, 1974

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting mineral patent application AR 030706.

Reversed and remanded.

Mining Claims: Possessory Right

An assertion by a co-owner of a mining claim that his interest has been omitted in another co-owner's application for patent is not an adverse claim within the meaning of the pertinent statutes, 30 U.S.C. §§ 29-32.

Mining Claims: Possessory Right

In adverse proceedings between a placer claimant and lode claimant, a state court may only determine possession to that ground which is encompassed by both claims.

**Mining Claims: Determination of
Validity—Mining Claims: Possessory
Right**

While the judgment rendered by a state court as a result of adverse proceedings is binding on the parties with respect to possessory rights, the judgment will not bind the Department of the Interior with respect to determination of the validity of the claims or their nature as lode or placer since the Government was not a party to the proceedings.

APPEARANCES: Elmer C. Coker,
Esq., Phoenix, Arizona, for appellants.

The Estate of Arthur C. W. Bowen, deceased, and Superior Perlite Mines, Inc., Bowen's successor in interest, have appealed from a decision by the Arizona State Office, Bureau of Land Management, dated March 22, 1972, rejecting mineral patent application AR 030706 for the reason that a state court had held that Bowen was not entitled to possession of the claims.

Bowen's patent application consists of four placer claims, the Superior Perlite Nos. 1, 2, 3, and 4. However, the first claims located in this area were four lode claims; two were located by Bowen and two were located by the predecessors in interest of the Sil-Flo Corp.,¹ the party asserting an adverse claim to Bowen's patent application. When these lode claims were located in 1944, it was the custom in this mining district to locate perlite as a lode deposit. Several years later substantial doubts had arisen as to whether perlite was more properly locatable as placer material. Consequently, many locators began covering their

¹ Sil-Flo's two lode claims are the Elva F. No. 1 and Sandy No. 1. Bowen's lode claims are the David R. No. 1 and the Superior Perlite No. 1 which should not be confused with Bowen's Superior Perlite No. 1 placer claim. In order to avoid confusion, the lode claims will hereinafter be referred to as Sil-Flo's lode claims and Bowen's lode claims.

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lode claims with placer claims in order to be able to comply with either the lode claim statute or the placer claim statute.² In 1950 and 1954, Bowen and seven associates located the first two of the four placer claims in his application, the Superior Perlite Nos. 1 and 2, respectively.³ These two claims included within their boundaries all four of the previously located lode claims: the two belonging to Sil-Flo's predecessors in interests and the two belonging to Bowen.

Bowen and Sil-Flo entered into an agreement in 1954, by which Bowen conveyed to Sil-Flo the right to mine, remove and sell the perlite ore from Bowen's two lode claims in exchange for royalty payments and certain other obligations on the part of Sil-Flo. In 1955, a supplemental agreement was entered into extending the terms of the original grant to Bowen's placer claims then in existence, the Superior Perlite Nos. 1 and 2.

By 1960, Bowen had apparently become dissatisfied with the agreements and instituted an unlawful detainer action against Sil-Flo in the Arizona courts. A judgment was ultimately rendered in favor of Sil-

Flo. *Bowen v. Sil-Flo Corp.*, No. 117905 (Maricopa County, Ariz. Super. Ct., Apr. 17, 1961).

On June 5, 1961, Bowen filed an application for patent for four placer claims, the Superior Perlite Nos. 1 and 2 and two additional placer claims located in 1960 and 1961, the Superior Perlite Nos. 3 and 4, respectively. The application for patent was silent as to Sil-Flo's two lode claims, Sil-Flo's interest in Bowen's two lode claims, and Sil-Flo's interest in Bowen's Superior Perlite Nos. 1 and 2 placer claims.

Sil-Flo filed a timely adverse claim with the Arizona State Office and began proceedings in an Arizona Supervisor Court, asserting 1) its ownership of its two lode claims, 2) its interest in Bowen's two lode claims, and 3) its interest in two of Bowen's placer claims, the Superior Perlite Nos. 1 and 2. No adverse claim was filed by Sil-Flo with respect to Superior Perlite Nos. 3 and 4.

The Arizona Superior Court found that Sil-Flo was entitled to possession of its two lode claims and that Bowen was entitled to possession of his two lode claims. On appeal the Arizona Court of Appeals affirmed the judgment as to the lode claims, but modified it as to the placer claims by holding that, "*** neither party established right to possession to areas outside of the four lode claims in questions." *Bowen v. Sil-Flo Corp.*, 9 Ariz. App. 268, 451 P.2d 626, 638 (1969).

² The lode claim statute is 30 U.S.C. § 23 (1970), which describes a lode as " * * * veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *." The placer claim statute is 30 U.S.C. § 35 (1970), and it describes a placer as anything other than a lode.

³ Superior Perlite No. 2 was later amended to include more acreage. Still later, Bowen acquired the interests of his seven associates in all of the placer claims.

Subsequent to the court proceedings, the successors in interest of both Sil-Flo and Bowen entered into a written agreement which purported to divide the disputed property and waive any adverse claims.

On March 22, 1972, the Arizona State Office, Bureau of Land Management, without reference to the post-trial agreement of the parties rejected Bowen's entire application, relying on its interpretation of the Arizona Court of Appeals decision that neither party was entitled to possession of the placer claims.⁴

There are three basic issues presented on appeal: two dealing with the jurisdiction of the Arizona courts and one dealing with the effect, if any, to be given to the judgment of the Arizona courts.

The first jurisdictional issue concerns the scope of the Arizona court's final decree. The appellants have argued that since no adverse claim was filed as to Superior Perlite Nos. 3 and 4 placer claims, the Arizona courts had no jurisdiction to enter judgment with respect to those two claims.

After a close examination of the decision of the Arizona Court of Appeals⁵ we can find no indication that the Arizona courts ever intended to assume jurisdiction over Superior Perlite Nos. 3 and 4 placer claims. Indeed, those claims are not only not mentioned in the decision, but the Arizona Court of Appeals

refers explicitly to a controversy concerning two placer claims⁶ and refers throughout the opinion to Superior Perlite Nos. 1 and 2.

It is apparent to us that because of the broad language used by the Arizona Court of Appeals in its modification of the Superior Court's decree, both the Arizona State Office, and the appellants have erroneously assumed that the decree was applicable to Superior Perlite Nos. 3 and 4. Therefore, that portion of the Arizona State Office decision rejecting Superior Perlite Nos. 3 and 4 placer claims is reversed.

The second jurisdictional issue involves the nature of the claims asserted by Sil-Flo in adverse proceedings with respect to Superior Perlite Nos. 1 and 2 placer claims.

The appellants argue that the Arizona courts had no jurisdiction over the area in those placer claims *outside* of the four lode claims, since the claims filed by Sil-Flo were not the kind of adverse claims contemplated by the statutes conferring jurisdiction on the state courts, 30 U.S.C. §§ 29-32. Those statutes provide in pertinent part:

Where an adverse claim is filed during the period of publication, it shall * * * show the *nature, boundaries, and extent* of such adverse claim, and all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. (Emphasis added.) [30 U.S.C. § 30.]

If, in any action brought pursuant to section 30 of this title, *title to the ground in controversy* shall not be established

⁴Interior Department regulations, 43 CFR 3862.1-1, 3863.1 require proof of possessory right before patent may issue.

⁵*Bowen v. Sil-Flo Corp., supra.*

⁶451 P.2d at 627.

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by either party * * * judgment shall be entered according to the verdict. In such case * * * the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. (Emphasis added.) [30 U.S.C. § 32.]

The appellants argue that these statutes do not include those claiming through the title⁷ of the patent applicant or, as in this case, those claiming as co-owners. And, they argue, since the "adverse" claim filed by Sil-Flo was based on the 1954 and 1955 agreements between the parties, by which Bowen granted Sil-Flo an interest in his claims, the claim was not "adverse" within the meaning of the statute.

The appellants have correctly stated the principle of mining law that claims of co-owners are not adverse claims for the purposes of the relevant statute. This principle is well supported by Supreme Court opinion, *Turner v. Sawyer*, 150 U.S. 578 (1893), departmental decision, *Thomas v. Elling*, 25 L.D. 495 (1897), and departmental regulation, 43 CFR 3872.1.

In mining law, the source of title is a location supported, inter alia, by a mineral discovery. Where there is no conflict between different locations (or sources of title) there is no adverse claim. *Turner v. Sawyer*, *supra*. Therefore, while the Arizona Court of Appeals clearly had juris-

diction to determine possession to the *lode claims* and that area of the placer claims contained therein, it did not have jurisdiction to determine the possession of any area *outside* the lode claims, since there is only one source of title to that area of the placer claims, and consequently there can be no adverse claim of the sort contemplated by 30 U.S.C. § 30 (1970).⁸

There remains to be considered the question of the effect of the judgments of the Arizona courts with respect to whether perlite is locatable as a lode or placer. It was necessary for the Arizona courts to decide that issue in order to determine possession. While the finding of this Arizona courts on this issue is binding on the adverse parties with respect to possession, it is not binding on the Government with respect to the determination of the validity of the claims since the Government was not a party to the litigation. In this regard the Supreme Court has stated:

It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the

⁷ Title is used in this sense to mean right of possession against everyone except the Government. Fee title remains with the Government until issuance of a patent.

⁸ It should be emphasized that the lode claims held by Sil-Flo in its own right were "adverse claims" to the placer claims asserted by Bowen within the purview of 30 U.S.C. § 30, and the court properly recognized its jurisdiction under the statute as to the conflict between these claims.

government may be determined by the courts against the latter. [*Perego v. Dodge*, 163 U.S. 160, 168 (1896).]

See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-337 (1963); *Clipper Mining Co. v. Eli Mining and Land Co.*, 194 U.S. 220, 234 (1904); *Bowen v. Chemi-Cote Perlite Corporation*, 102 Ariz. 423; 432 P. 2d 435, 443 (1967); *Bowen v. Sil-Flo Corp.*, *supra*; *Alice Placer Mine*, 4 L.D. 314, 317 (1886); *Chemi-Cote Perlite Corp. v. Bowen*, 72 I.D. 403, 408 (1965); *Ethelyndal McMullin*, 62 I.D. 395, 399-400 (1955).

Even so, the Department may properly accept and follow the judgment of a court of competent jurisdiction, determining as between contending parties their respective rights to, and interests in, the land in controversy. *Thomas v. Elling*, *supra*, 498. This would necessarily involve an independent determination by an appropriate officer of the Department that the judgment expressed the correct result.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to the Arizona State Office for further consideration.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

MARTIN RITVO, *Member*.

CASTLE VALLEY MINING COMPANY

3 IBMA 10

Decided January 25, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from an initial decision by an Administrative Law Judge (DENV 73-7-P), dated June 7, 1973, vacating a Notice of Violation citing 30 CFR 70.100(a) and assessing a civil monetary penalty of \$45 for other violations.

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Computer Printout

A Notice of Non-Compliance is an official government record and will support a Notice of Violation of section 202 of the Act.

APPEARANCES: Mrs. Eleanor S. Lewis, on behalf of appellant, U.S. Bureau of Mines (MESA). Castle Valley Mining Co., appellee, has not participated in this appeal.

OPINION BY MR. ROGERS INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

Notice of Violation No. 1 GM was issued on December 28, 1971, alleging that section 003-0 of the Castle Valley Mining Company (Castle Valley), Deer Creek Mine, was in violation of the provisions of 30 CFR 70.100(a) which are as follows:

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(a) Effective June 30, 1970, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 3.0 milligrams of respirable dust per cubic meter of air.

This and other regulations set forth under Subparts A, B, C, D, and E, of Part 70 of Title 30, CFR, covering respirable dust standards, sampling procedures, analysis of samples, etc., were adopted and published in the Federal Register by the Secretary pursuant to sections 202 and 104(i) of the Federal Coal Mine Health and Safety Act of 1969 (Act)¹ and the Secretary's rule-making authority in section 508 of the Act. Additionally, the Board takes official notice of Bureau of Mines Information Circulars concerning this subject, Nos. 8503, dated February 1971; 8504, dated March, 1971; 8520, dated August 1971; and 8484, dated July 1970, which have been widely distributed and are well-known in coal-mining circles.² The Board also takes official notice that the techniques employed by the Secretary in carrying out these provisions of the Act and the regulations issued pursuant thereto are based upon scientific principles generally recognized in the scientific community.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Sampling and Evaluating Respirable Coal Mine Dust, February 1971; Respirable Mine Dust Sample Processing Laboratory, August 1971; Respirable Dust Sampling Requirements Under the Federal Coal Mine Health and Safety Act of 1969, July 1970; Computerized Programming of Respirable Dust Sampling Data, March 1971.

Section 202 of the Act, and heretofore cited regulations issued pursuant thereto for the collecting and analyzing of respirable dust samples, require the operator to purchase the necessary personal sampler pumps and batteries from one of the approved sources listed in 30 CFR 70.204. In addition, the operator must obtain individual filter cassettes which are prenumbered by the manufacturer; the initial weight of the capsule filter is recorded on a mine data card supplied with the assembly. The sampler pump with the cassette inserted is worn by high-risk miners during an eight-hour shift at designated exposure areas in the mines. At the conclusion of the shift, the cassette is removed from the sampler and mailed immediately to the MESA Pittsburgh Technical Support Center. Thus, under the regulations, the operator plays an integral part in the dust-sampling system, inasmuch as it is the operator's responsibility to collect and submit the cassettes for laboratory analysis.

In accordance with the regulations and established procedures, when the cassette arrives at the laboratory in Pittsburgh it is logged in, disassembled, dried in vacuum desiccators and the filter is weighed under controlled conditions of temperature and humidity. The laboratory weight is compared with the pre-printed manufacturer's weight to determine the dust concentration to be recorded. After a filter is weighed and the sample analyzed, the results are telecommunicated to

the Denver Automatic Data Processing Center by means of a data-communicator unit coupled to a data-phone modem system. The information telecommunicated to the Denver Processing Center is programmed into a computer which stores the data and calculates the dust concentration from the telecommunicated information. When ten such samples have been programmed, a paper tape is generated by the computer and then forwarded to the Communications Section of the Division of Automatic Data Processing. The paper tape is read into a teletype ASR-35 machine, and the messages are transmitted to appropriate MESA District or Subdistrict Office. The teletype message received at the District or Subdistrict Office is not a copy but is an original computer print-out. It is then distributed to the mine operator. Under this procedure, MESA must rely upon the integrity of the operator in performing the collection of samples and the operator must rely upon the integrity and accuracy of the results reported back to the operator by MESA in order to make the system work. Of course, either the operator or MESA may question the reliability of the system at any stage. We note that the regulations require that the computer printout results be furnished to the operator in all instances, whether or not a violation of the standard is indicated, so that there is, in effect, continual advice to the operator as to whether

the mine or section of the mine in question is in compliance.

Upon receipt of the mentioned message, if noncompliance with the dust standard is indicated, a Notice of Non-Compliance and Violation is served upon the operator.³ This was the procedure followed which led up to the issuance of Notice of Violation No. 1 GM to Castle Valley on December 28, 1971. A copy of the Notice of Non-Compliance offered in evidence in this case is attached hereto as Appendix No. 1.

On July 7, 1972, MESA filed a petition for the assessment of civil penalties against Castle Valley for this and other violations and a hearing on the merits was conducted on February 8, 1973, before the Administrative Law Judge (Judge). The Judge, in his decision issued June 7, 1973, vacated Notice of Violation No. 1 GM, and, with respect thereto, stated as follows:

As evidence of the occurrence of the violation, the Bureau submitted as an exhibit the printout sheet received from the data processing office in Denver. This document was received in evidence over the objection of the operator for the reason that hearsay may be admitted in administrative proceedings.

The Bureau * * * was unable to offer any additional corroborative evidence to support its allegation that a violation occurred. A single document, which is hearsay, standing alone and unaffirmed

³ Section 104(1) of the Act in pertinent part provides:

"If, based upon samples taken and analyzed and recorded pursuant to section 202(a) of this Act, * * * the applicable limit on the concentration of respirable dust required to be maintained under this Act is exceeded and thereby violated, * * * authorized representative shall issue a notice fixing a reasonable time for the abatement of the violation." * * *

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does not constitute substantial evidence upon which a finding can be made that the violation occurred. (Dec. 5.)

Contentions of the Parties

The contention of the appellant (MESA) is that as a matter of law the Judge erred in his conclusion that the evidence submitted, without more, is insufficient to support a violation of section 70.100(a), Title 30 CFR.

Although Castle Valley has not participated in the appeal to this Board, at the hearing below counsel for Castle Valley objected vigorously to the introduction in evidence of the teletype information which was the basis for the issuance of Notice of Violation No. 1 GM. The objections were that no proper foundation had been laid and that the information contained in the printout was purely hearsay evidence and should not be admitted, or, if admitted, should be given no weight.

The Judge ruled that the Notice of Non-Compliance was admissible for the reason that hearsay may be admitted in the Judge's discretion in an administrative proceeding, but that standing alone could not form the basis for a finding of a violation.

MESA contends that the Judge, in ruling that in the absence of corroborative evidence the Notice of Non-Compliance could not form the basis for a finding of a violation, was apparently relying upon the residuum rule which would require that a finding be supported by evi-

dence which would be admissible in a jury trial, and further contends that the residuum rule is not applicable to administrative hearings, but even if so that the Notice (print-out) would be admissible in a jury trial. MESA further advances the argument that the Notice of Non-Compliance was made in the ordinary course of business and that the information contained therein is an exception to the hearsay rule. It urges upon the Board that the provisions of 28 U.S.C. § 1732 not only establish the admissibility of such evidence before administrative tribunals [*Olympia Insurance Company v. Harrison, Inc.*, 418 F. 2d 669 (5th Cir. 1969), and *La Porte v. United States*, 300 F. 2d 878 (9th Cir. 1962),] but goes on to state that the information contained in the Notice of Non-Compliance should be relied upon as the basis for determining that a violation occurred.

Issue

Whether a Notice of Non-Compliance standing alone is sufficient to establish a prima facie showing of a violation of the respirable dust standards.

Discussion

This is the first time the Board has squarely met this issue. In its review, the Board has been keenly conscious of the legislative history of the 1969 Act, and notes that one of the principal aims of the Congress, in addition to providing mandatory standards to protect

miners from danger to life and limb, was to seek enforcement of stringent respirable dust standards. We particularly take notice of the following:

A new dimension has been added to the already known hazards of coal mining. The new hazard is not violent, it is not even visible, yet it embraces in its deadly arms over 100,000 of our Nation's miners—black lung.

Unlike the violent death that may result from a methane ignition, mine fire, or other accident, black lung does not kill instantly. First, it causes many years of painful breathlessness before ultimate death—or—it causes heart failure.

The disease is caused by respirable coal dust, * * *.

It is clear that a properly enforced official standard for respirable coal dust would make a significant reduction in new cases of coal worker's pneumoconiosis, and hopefully reduce the rate of progression in miners who have already contracted the disease.⁴

In addition to our examination of the legislative history of Title II of the Act, we note that section 202(a) of the Act provides that "such [dust] samples shall be taken by any device approved by the Secretary and the Secretary of Health, Education and Welfare and in accordance with such methods, at such locations, at such intervals, and in such manner as the Secretaries shall prescribe in the Federal Register * * *." As heretofore noted, such devices and methods have been so prescribed by both Secretaries.

In reviewing the case at hand, we believe there can be no dispute

as to the *relevancy* of the contents of the Notice of Non-Compliance in the determination of whether a violation of the dust standard occurred. The Notice is, in effect, an out-of-court statement offered for the proof of the matter asserted therein and as such it is hearsay. It has been held, however, under the Business Records exception to the hearsay rule that the information obtained from a computer printout is admissible to prove the truth of the matter asserted.⁵ We further take notice that the Business Records Act, 28 U.S.C. § 1732(a) (1970) has been held applicable to government agencies in numerous decisions,⁶ and provides as follows:

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

⁴ Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Cong., 2d Sess., 111 (1970).

⁵ *United States v. Russo*, 480 F.2d 1228 (6th Cir. 1973); *Clinchfield Coal Company*, Docket No. MORG 72-68-P (July 20, 1973).

⁶ *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950); *U.S. v. Friedland*, 444 F.2d 710 (1st Cir. 1971).

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We believe the Notice of Non-Compliance clearly comes within the provisions and meaning of this section and as such is admissible.

However, we do not rest our disposition of this case solely on the provisions of the Business Records Act, and the possibly limited probative value of evidence admitted thereunder. We have also examined the provisions of 28 U.S.C. § 1733 (a) (1970), and adopt the rationale of the author judge in *Southard v. United States*, 218 F.2d 943, 946-47 (9th Cir. 1955), wherein he stated, in pertinent part:

*** the federal statute, Section 1733, governs and the problem is one of determining the effect thereof. *** This court believes that the following rule should be applied to sales documents of government agencies when the documents are offered under Section 1733. The sales documents will make a prima facie case for sale and delivery which will be sufficient alone to draw an issue for the government in a contested case unless the documents are self vitiating. That is, there must be nothing on the face of the documents which throws doubt on the sale or delivery having been made; otherwise the prima facie case is not made by the documents alone.

*** the document contains nothing inconsistent ***. Therefore, the documents should be held to make an abiding prima facie case.

* * * * *

*** it is believed that the rule enunciated here is a fair and workable one and gives a reasonable meaning to the statute; that is, government sales documents will make a prima facie case unless within the four corners of the instruments a doubt or question arises ***.

[28 U.S.C. § 1733(a) (1970) provides:

"(a) Books or records of account or

minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

The reasons for this provision is that courts have long indulged in the legal presumption of regularity in the conduct of governmental affairs and that records emanating from an official source pursuant to law or regulation reflect the truth of the event or fact recorded. In addition, there is a rational justification which obtains in every recognized exception to the hearsay rule; that is, a circumstantial probability of trustworthiness, and a necessity for the evidence.⁷

This section does not make a government document received in evidence conclusive, irrefutable or immutable. If such papers do not speak the truth, the defense can prove the untruth of the document.⁸ Moreover, we think it would be highly impracticable, if not impossible, to require in every instance that MESA, by witnesses at a hearing, account for the identity and chain of possession of dust samples submitted to the testing laboratory by an operator. We believe the system and techniques devised by the Secretary, and in which the operator plays a part, are so conceived as to virtually rule out possibilities that the samples were tampered with or that the

⁷ *United States v. Van Hook*, 284 F.2d 489, 492 (7th Cir. 1960) and cases cited therein.

⁸ For instance the source data cards are mailed to Denver, where they are microfilmed for recall when needed. Thus, if the operator is of the opinion that an error in transmission of the data has occurred he can always request an additional original computer printout.

weighings and resulting printouts are in error. Indeed, Castle Valley has not indicated in the record anything which would tend to show that there was any tampering, misidentification, use of an unacceptable scientific technique, or that the samples in this case were not handled by proper personnel in the customary fashion and in accordance with regulations. Full discovery procedures were available to Castle Valley had they had any reason to question the reliability of the information recorded in the Notice of Non-Compliance. No irregularity has been alleged and no arguments which have been advanced would tend to bring into question or refute the reliability of the Notice. See *Rosedale Coal Company v. Director of the U.S. Bureau of Mines*, at 247 F.2d 299 (4th Cir. 1957).⁹

In view of the foregoing, we find that the Notice of Non-Compliance was prepared in the regular course of MESA business, under its clear statutory duty, in full conformity with the Act and regulations. We believe, based upon our understanding that a usual and customary routine was here followed, that a presumption may be made as to the reliability of the testing procedure and the professional qualifications of each individual in the chain of custody.¹⁰

THEREFORE, we hold that the Notice of Non-Compliance was

properly admissible pursuant to 28 U.S.C. 1733(a) (1970), as an official government record.

We come now to the question as to what probative value or weight should be given by a Judge to this evidence. In civil penalty proceedings under section 109 of the Act, and under 43 CFR 4.587, the burden of proving the fact of a violation by a preponderance of the evidence is placed upon MESA. It is our view that the Notice of Non-Compliance creates a prima facie case (a presumption of the truth) of the facts asserted therein. Of course, such presumption may be dissolved upon the production of rebutting evidence. As heretofore noted, however, in this case, Castle Valley has not offered any such evidence, nor has it presented any substantive challenge concerning the reliability of the sampling procedure. In the absence of any rebutting evidence, it is our opinion that the Judge should have given probative value and weight to the Notice of Non-Compliance which indicated that a violation of section 202(b) of the Act and section 70.100(a) of the regulations had been violated.

After finding that a violation did occur we have considered, as did the Judge below, and hereby adopt his findings and conclusions with respect to the size of the business of the operator, the effect on the ability of the operator to continue in business, and the absence of a history of previous violations. In addition we have considered the un rebutted testimony of the inspector that the violation of the respirable

⁹ *United States v. Lavin*, 480 F.2d 657, 662 (2d Cir. 1973).

¹⁰ *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962); *United States v. Richardson*, 484 F.2d 1046 (2d Cir. 1973).

January 25, 1974

dust standard occurred because of a lack of ventilation in that curtains were not kept up past the continuous miner operator to sweep or hold the dust away or that sufficient water was not provided. (Tr. 38.) We have determined that the operator was negligent in allowing the condition to exist. Further, although the Board considers all violations of the respirable dust standards to be of a serious nature, it has determined that the violation in this case was confined to one section of the mine and that four of the ten samples analyzed were below the required standard and one exceeded the standard by only 0.1 milligram. Under all circumstances and criteria, including those considered by the Judge, we hold that a penalty of \$20 is appropriate for this violation.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)) IT IS HEREBY ORDERED that the decision issued June 7, 1973, IS MODIFIED to the

extent that Notice of Violation No. 1 GM IS REINSTATED, that Castle Valley Mining Company IS ASSESSED \$20 for such violation, and that the total assessment of \$65 be paid within 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

APPENDIX NO. 1

*** NOTICE OF NON-COMPLIANCE ***

December 28, 1971—0001

Mine 42-00121-0, Deer Creek, Mine (UG)

Section 003-0, Castle Valley Mining Co.

Emery, Utah

In accordance with section 70.260 of the Mandatory Health Standards, underground coal mines, the following is a cumulative average concentration of respiratory dust, relative to the respective section of your mine.

Cassette No.	Date	Concentration	Prod.	Intake air		
				Cassette	Date	Concentration
10016540	09-10-71	03.1	0469	10020710	12-20-71	05.4
10018616	12-07-71	01.3	0532	-----	-----	-----
10019260	12-07-71	04.0	0371	-----	-----	-----
10018587	12-09-71	04.8	0595	-----	-----	-----
10002257	12-13-71	08.3	0702	-----	-----	-----
10018600	12-15-71	09.8	0525	-----	-----	-----
10004750	12-19-71	00.6	0448	-----	-----	-----
10016404	12-21-71	03.6	0700	-----	-----	-----
10018524	12-22-71	01.6	0581	-----	-----	-----
10002067	12-23-71	06.6	0560	-----	-----	-----

NOTE:—Cumulative 034.7 average 0548.

Interim compliance panel permit

Permit No.	Date- issued	Date- expires	Limit
000000	00-00-00	00-00-00	30 milligrams.

**ESTATE OF TON-NAH-PA
(NAVAJO ALLOTTEE NO. 011410,
DECEASED)**

2 IBIA 152

Decided January 28, 1974

Petition to reopen.

Denied.

**225.0 Indian Probate: Evidence:
Generally**

The findings of an examiner of inheritance will not be set aside when the findings are supported by substantial evidence adduced at a Probate Hearing.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

Petition to reopen filed more than three years after the final determination of heirs will not be granted unless there is compelling proof that the delay was not occasioned by the lack of diligence on the part of the petitioning party.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

It is in the public interest to require Indian Probate proceedings to be concluded within some reasonable time in order that property rights of heirs and devisees in trust allotments be stabilized.

APPEARANCES: Mike Celestre, Esq., for petitioner, Voncelle, also known as Atad Yazzie or Mrs. Teddy Herman Victor.

OPINION BY MR. WILSON

**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before the Board upon a petition for reopening of probate filed by Mike Celestre, Esq., for and in behalf of Voncelle, also known as Atad Yazzie or Mrs. Teddie Herman Victor, hereinafter referred to as petitioner, pursuant to 43 CFR 4.242.

The estate herein having been closed for more than three years the matter was properly referred to the Board of Indian Appeals by Administrative Law Judge Richard B. Denu, in accordance with the provisions of 43 CFR 4.22 (h).

The record indicates the decedent died in July of 1941 and that her estate was thereafter probated by the Department on January 15, 1944.

The petitioner in support of her petition to reopen alleges:

(1) That the petitioner had no notice of the hearing and as a result did not attend the hearing.

(2) That neither the petitioner's husband, Teddy Herman Victor, nor any other representative of hers attended the hearing in her behalf.

(3) That the examiner erred in awarding Hosten-Nez-Begay, a $\frac{1}{4}$ share in the decedent's estate as the surviving husband and awarding him a further $\frac{1}{4}$ share as father of Shorty-Nez-Begay, subsequently deceased son of the decedent.

(4) That the shares awarded to Hosten-Nez-Begay should have been awarded equally to the petitioner and her sister, Carrie Bah, or her heirs.

It is noted from the record that Administrative Law Judge Richard B. Denu, on July 5, 1972, denied a

NO. 011410, DECEASED)

January 28, 1974

similar petition to reopen filed by the petitioner herein. No appeal was taken from the said denial. Ordinarily, failure to do so would be grounds for summary dismissal of any petition for reopening filed thereafter.

However, since the petition was filed more than three years after the final determination of heirs, the matter was outside the jurisdiction of the Judge. As a result his decision of July 5, 1972, being of no force and effect, would not be fatal to the present petition. The decision of July 5, 1972, however, can be considered as a recommendation not to reopen insofar as the petition herein is concerned.

Allegations (1) and (2) are clearly refuted by the sworn testimony given by petitioner's husband, Teddy Herman Victor, to the Examiner of Inheritance, E. S. Stewart, on July 15, 1943, at Huerfano Store District, New Mexico. Pertinent part of the testimony is as follows:

Q. What relation, if any, was Ton-Nah Pa, deceased Navajo Allottee No. 011410, to you?

A. My mother-in-law. *My wife had to go home, and asked me to take her place.* (Italics supplied.)

The record furthermore contains a signed statement of petitioner's husband to the effect that he was notified of the July 15, 1943 hearing and that he appeared and was given an opportunity to submit evidence showing the right of his wife

[the petitioner] to share in the estate.

From the foregoing, it is apparent that the petitioner was aware of the hearing even though she may not have actually been furnished a notice of the hearing. Failure to furnish her a copy of the notice is attributable to the fact that the petitioner was erroneously considered a minor at the time of the hearing and for whom George Curley was duly appointed guardian ad litem. Petitioner, according to the record at the time of the hearing was 18 years of age and married and no longer a minor.

Petitioner's allegations set forth in the above items (3) and (4) insofar as Hosten-Nez-Begay's $\frac{1}{4}$ share inherited direct from decedent are likewise without merit. The testimony given at the hearing by George Curley, Freddie Hasuse and petitioner's husband, Teddy Herman Victor, fully supports the examiner's decision of January 15, 1944, and we see no reason to disturb such findings.

Assuming, *arguendo*, that there was merit in the petitioner's allegations circumstances in the case at bar do not justify waiver of the three-year limitation applicable to reopening of estates.

Although the Secretary has by express terms reserved to himself the power to waive and make exceptions to his regulations affecting Indian matters, such power will be exercised only in cases where the most

compelling reasons are present. *Estate of Sophie Iron Beaver Fisherman*, 2 IBIA 83, 80 I.D. 665 (1973); *Estate of Charles Ellis*, IA-1242 (April 14, 1966).

Furthermore, reopening of estates will be permitted only where it appears that the petitioner has not been dilatory in seeking his remedy. *Estate of Alvin Hudson*, IA-P-17 (May 29, 1969); *Estate of George Squawlie (Squally)*, IA-1231 (April 5, 1966); *Estate of Sophie Iron Beaver Fisherman*, *supra*.

In the first instance, petitioner in the case at bar has failed to come forth with any compelling proof to show that the long unusual delay of 29 years in not pursuing her remedy was not occasioned by the lack of diligence on her part. At the most she alleges generally without specification that attempts had been made to remedy the matter. This, of course, is insufficient and inadequate basis on which to infer diligence.

Secondly, the petitioner has failed to show a manifest injustice resulting from the decision of January 15, 1944.

Finally, it is in the public interest to require Indian Probate proceedings be concluded within some reasonable time in order to stabilize the property rights of heirs and devisees in trust property. *Estate of Abel Gravelle*, IA-75 (April 11, 1952). *Accord, Estates of Jose San-doval et al.*, IA-1337 (May 17, 1966).

In view of the foregoing reasons we find no justification for granting

the petitioner's request to reopen the estate herein. Accordingly, her petition must be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reopen filed by Voncelle also known as Atad Yazzie or Mrs. Teddy Herman Victor, is hereby DENIED and the Order Determining Heirs, dated January 2, 1944, IS AFFIRMED.

The Decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

DAVID J. MCKEE, *Chairman*.

UNITED STATES v.
DORA M. WERRY
AND
HENRY HIRSCHMAN

14 IBLA 242

Decided January 28, 1974

Appeal from decision of Administrative Law Judge Dent D. Dalby, canceling millsite entries (I-4035, I-4036, I-4037).

Affirmed as modified.

Mining Claims: Millsites

A vague intention to use or occupy land embraced in a millsite claim for mining or milling purposes at some time in the future is not sufficient to comply with the requirements for obtaining a millsite.

compelling reasons are present. *Estate of Sophie Iron Beaver Fisherman*, 2 IBIA 83, 80 I.D. 665 (1973); *Estate of Charles Ellis*, IA-1242 (April 14, 1966).

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The Decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

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DAVID J. MCKEE, *Chairman*.

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HENRY HIRSCHMAN

January 28, 1974

Mining Claims: Millsites—Withdrawals and Reservations: Generally

The United States can at any time withdraw its consent to occupancy of public land under the mining laws by withdrawal of the land and if the claimant cannot show that the millsite is being occupied or used for mining or milling purposes as of the date of withdrawal, the claim is properly declared invalid.

Mining Claims: Millsites

The fact that a millsite claimant is the owner of a patented or patentable mining claim does not automatically entitle him to a millsite.

Mining Claims: Millsites—Mining Claims: Determination of Validity

Where the Government brings charges against a millsite claim alleging that no present use or occupation of the claim for mining purposes is being made, and a *prima facie* case is established in support of the charge, the burden shifts to the claimant to show compliance with the provisions of the statute.

APPEARANCES: Douglas D. Kramer, Esq., Kramer, Plankey, Smith and Beeks, Twin Falls, Idaho, for appellants; Erol Benson, Esq., Office of the General Counsel, Department of Agriculture, for the appellee.

OPINION BY MR. STUEBING
**INTERIOR BOARD OF LAND
 APPEALS**

Dora M. Werry and Henry Hirschman have appealed from the decision of the Administrative Law Judge dated November 27, 1972, canceling their millsite entries because they were not used or occupied

for mining or milling purposes as required under the Act of May 10, 1872, 30 U.S.C. § 42 (1970), prior to the withdrawal of land from location under the mining laws of the United States.

Notices of location for the three millsites located in the Sawtooth National Forest, Blaine County, Idaho, were filed in 1967. Henry Hirschman filed a notice of location for the Last Chance Millsite and Louis H. Hirschman, his son and predecessor in interest, filed for the U and I Millsite. Henry Hirschman owns two patented mining claims bearing the same names as the millsites. Dora Werry's predecessor in interest filed for the Curliss Millsite. Dora Werry holds the patent to the Curliss lode mining claim. The land on which all the millsites are located was withdrawn on January 28, 1970. 38 F. R. 1120 (Jan. 28, 1970); 43 CFR 2351.3.

The Bureau of Land Management, upon recommendation of the United States Forest Service, filed a contest against each millsite claim on March 18, 1971, charging that:

1. The millsite is not needed, used, or occupied by the proprietor of a vein, lode, or placer claim for mining, milling, processing, or beneficiation purposes, or other operations in connection with such claims.
2. The millsite has no quartz reduction mill or reduction works thereon.
3. The millsite is not being held in good faith for bona fide mining, milling, beneficiation or related purposes.

A hearing was held on July 18, 1972. Mr. Kramer, attorney for the

appellants, moved to dismiss the Government's case on the grounds that it had not proved the case by a preponderance of the evidence, according to the allegations of its complaint. The Administrative Law Judge denied the motion as to charges 1 and 2, but granted the motion as to charge 3. (Tr. 105-106.)

John C. Combs, a forester, Recreation and Lands Branch Chief for the Forest Service, testified that he has been on the millsites in question at least 15 times and he has not seen any activity which would indicate that the sites are being used for mining or milling purposes. The only improvements which he noticed were a road (Warm Springs Road) which crosses a part of at least one or two of the claims and a small, undeveloped campsite. There is a small road which leads from Warm Springs Road to the camping area. Combs said that the Forest Service had recommended that the area which included the claims be withdrawn for recreational purposes. Gilbert Farr, employed by the Forest Service as the District Ranger of the Ketchum Ranger District, has been on the claims, and testified that he had not observed any activity by the appellants on the millsites. He saw the Forest Service development road and jeep trail but did not notice any structures on the property. Vernon T. Dow, a mining engineer for the Forest Service, noticed the road and the unoccupied campsite. He verified the fact that

there were no bunkhouses or other structures on the millsites.

As for the mining claims, Combs and Dow visited the Last Chance and U and I. Combs saw some old dumps and prospect diggings on the claims but stated that from appearance it had been several years since any mining activity had taken place. Dow stated that all the adits except one were caved in. He took some samples of dump material from both claims.

Both Farr and Dow visited the Curliss lode claim. Farr found evidence of a shaft but no evidence of recent mining activities. Farr did not investigate the mineral capacity of the Curliss lode claim. Dow found the discovery shaft, which was caved. He also discovered a whim (manpowered hoist) at the top of the incline shaft. Dow took a sample from across the width of the vein. Dow estimated that it had been 50 to 60 years since these mines were operated.

According to Dow, the nearest mill to the claims is located at Bassett Gulch, which is four miles east of the Last Chance and the U and I lode claims and one mile south of the Curliss lode.

Ted Werry, son of Dora Werry, testified that they paid \$600 to have the sites surveyed but that the surveyor was not recognized by the Government to survey federal lands. Appellants then started proceedings for patents for the millsites and applied to the Government for a second survey, paying \$600, but this

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survey was never made. Appellants claim that they need these millsites for processing and storing ore. They chose these particular sites because the road to Bassett Gulch which is above these sites is generally inaccessible in the winter due to snow slides.

They testified that they hesitated making improvements on the property because the Forest Service discouraged them from cutting trees to clear a road. They claimed that the Forest Service said they would be liable if anyone were injured on the property. They offered testimony to the effect that Dora Werry could afford to purchase the mill at Bassett Gulch and place it on the property but they were leery of doing this because the Government had not permitted use of a bulldozer for clearing.

There was testimony to show that Blaine County is heavily mineralized and has historically had a great deal of mining activity. As for the specific lode claims, Clifford Noxon, mine mechanic and miner, accompanied Ted Werry to the Last Chance and the U and I lode claims and helped him take samples. An assay report of these samples was admitted into evidence. Louis Hirschman testified that he and Mr. Reem-snyder, who mines in the area, took samples from the U and I and Last Chance lode claims. The assay reports from these samples were admitted into evidence. Samples taken from all three claims were assayed upon the Government's request and

those reports also were admitted into evidence.

The Administrative Law Judge found that the millsite claims were not being used or occupied for mining or milling purposes as required by statute, and he therefore canceled the claims. In reaching this decision he found that the evidence did not establish that any of the lode claims had economically minable quantities of ore. He also noted that appellants had made no effort to purchase the mill at Bassett Gulch or even to learn if the mill could be purchased or what price would be asked. Dow testified that he didn't know if the Bassett Mill was for sale, saying, "This is just a presumptive thing." (Tr. 180.) Jones testified that he understood that ownership of the mill was uncertain because the title was in litigation.

We affirm the Judge's holdings, but emphasize that the critical issue involved is whether appellants complied with the law as of January 28, 1970, the date of the withdrawal.

The effect of a withdrawal of public land is to prevent further acquisition of private rights in such land. See *United States v. Heirs of John D. Stack*, A-28157 (March 28, 1960). A mining claim initiated while the land was subject to the operation of the mining laws is not a valid claim unless there has been a discovery of valuable minerals within the limits of the claim prior to the withdrawal of the land from entry under the mining laws. *United States v. Everett*, A-27010 (Supp.)

(October 17, 1955); *United States v. Pulliam*, 1 IBLA 143 (1970); *United States v. Gunsight Mining Company*, 5 IBLA 62 (1972); *United States v. Duval*, 1 IBLA 103 (1970). If the claim was not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within its boundaries would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market value of the mineral. *United States v. Henry*, 10 IBLA 195 (1973). To validate a mining claim, compliance with the mining laws must precede withdrawal. Since the millsite is a creature of the mining laws, the same principle of law is applicable. The United States can at any time withdraw its consent to occupancy of public land under the mining laws by withdrawal of the land, subject to valid existing rights. The claimant must then be prepared to show that he has satisfied the requirements of the law at that time. *United States v. Henry*, *supra*. From the facts ascertained at the hearing, we find that appellants have not shown the necessary compliance to establish the validity of the millsite claims as of the date of withdrawal, January 28, 1970.

The pertinent part of the law for obtaining patent to millsites reads as follows:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode

for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres * * *.

30 U.S.C. § 42(a) (1970).

In *Alaska Copper Company*, 32 L.D. 128, 131 (1903), the Acting Secretary interpreted the requirements of the Act by stating:

* * * A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. * * *

In applying this interpretation to our case, we find that appellants fail to meet the mandate of the law. The evidence presented by appellants at the hearing does not show either a present occupation or use of the tract for mining or milling purposes as of January 28, 1970. There were no improvements indicative of occupation or use. Testimony on behalf of the Forest Service showed that there had been no recent mining activities on any of the lode claims, perhaps for as long as 50 or 60 years. The only noticeable activity of any description on the lode

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claims was the gathering of samples which is not "mining activity" as envisioned by the drafters of the statute. None of the mines were being operated so it is apparent that the millsite claims were not used for mining or milling purposes in connection with the lode claims. *United States v. S.M.P. Mining Company*, 67 I.D. 141 (1960); *United States v. Skidmore*, 10 IBLA 322 (1973).

Appellants allude to plans to use the site for the storage of ore from the lode claims. They indicate that acquisition of the millsite claims is a condition precedent to reopening their mines. They argue that they must have a place to store the ore before commencing mining operations. Storing ore may be considered to be a use of the land for mining purposes. See *Charles Lenning*, 5 L.D. 190 (1886). However, a vague intention to use the land at some future time does not satisfy the requirements of the statute. *United States v. S.M.P. Mining Company*, *supra*; *United States v. Herron*, A-27414 (March 18, 1957).

We have also considered appellants' rather irresolute and tentative desire to acquire the mill at Bassett Gulch. Even if we assume that such a purchase is feasible, we are still faced with the fact that there was no mill on the property at the date of withdrawal. The prospective acquisition of a mill implies future use of the land and is therefore insufficient where no action has been initiated to devote the land to the purposes contemplated by the law.

When the claimant is not actually using the land, he must show an occupation by improvements, or otherwise, as evidence of intended use of the tract in good faith for mining or milling purposes. *Charles Lenning*, *supra*. The testimony of the Forest Service showed no evidence of improvements which would indicate occupation and use. Appellants offered no evidence of improvements, but claim that they were hampered in their progress to clear and improve the property by the remarks of Forest Service personnel. Having studied the testimony, we do not find that the Forest Service employees said anything that would prevent appellants from using the land within the confines of the statute. The Act of July 23, 1955, 30 U.S.C. § 612 (1970) permits a claimant of any claim located under the mining laws to sever, remove or use any surface resource subject to management or disposition by the United States, to the extent required for such claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures, or to provide clearance for such operations. See also *Solicitor's Opinion*, 64 I.D. 301 (1957).

Appellants maintain in their statement of reasons that the Administrative Law Judge's decision is contrary to the law and evidence in the case and that his findings of fact are not supported by the evidence. The preceding analysis of the facts and the application of the law to

these facts show that this contention is without merit.

Appellants assert that the Administrative Law Judge arbitrarily refused to admit into evidence actual samples from the lode claims. Although he did not admit the samples, he considered all the testimony and assay reports relating to the samples in rendering his decision. He noted that the samples themselves did show significant mineral values but found that there was no showing to establish that there are economically minable quantities of ore on any of the lode claims.

We generally agree with the Judge's findings. We stress, however, that the mineralization or potential productivity of nearby mining claims, patented or unpatented, cannot be relied upon in 1972 to show the validity of millsite claims located on land which was withdrawn early in 1970. That is to say that evidence of a mine's potential for future commercial development cannot be applied with retrospective effect to establish the past validity of an associated millsite claim, where the imposition of a withdrawal requires that the validity of the millsite be tested as of the time of the withdrawal.

Appellants argue that the Government should carry the burden of proof in the proceeding since it initiated the contest. They claim that the fact that they must carry the burden is contrary to the procedure in the courts and constitutes bureaucratic abuse. In *United States*

v. S.M.P. Mining Company, supra, at 144, the Deputy Solicitor discussed this point:

The appellant, as the party seeking a gratuity from the Government, must assume the burden of showing that it has complied with the terms of applicable mining laws, and where, as here, the appellant's compliance with the applicable law is challenged by the Government and a *prima facie* showing is made that the claim is invalid, the burden then shifts to the appellant to show that the claim is valid. *Foster v. Seaton*, 271 F.2d 836 (1959).

We find this responsive to appellants' contention.

Appellants seek to distinguish between cases in which the Government contests a claim which is not the subject of a patent application and cases in which application for patent has been filed. They admit that the law requires use of the millsite for mining or milling purposes before the claim can be patented, but assert that their patent application was not accepted. This distinction is not valid. A claimant must be prepared to show that a millsite meets the requirements of the law at the time the claim is contested or the land embracing the claim is withdrawn, whichever occurs first. *United States v. Murer*, 4 IBLA 242 (1972).

We also disagree with appellants' interpretation of the last sentence of 30 U.S.C. 42 (1970) which reads as follows: "The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section." Appellants assert this means that the

owner of a mine is entitled to a mill-site and does not have to own a quartz mill or reduction works. Simple analysis of the language of the statute disproves this contention. Moreover, the issue of whether the owner of a *patented* mining claim is automatically entitled to a millsite claim has been decided. In *United States v. Wedertz*, 71 I.D. 368, 373 (1964), the Acting Solicitor discussed this point, stating:

* * * The fact that the claims here have been patented is not a critical distinction since all the indications are that at the time when Wedertz acquired the claims there was no longer any valid discovery exposed on the claims.¹ Of course, since the claims have been patented, this would have no bearing on the title to the land. The point is, however, that; merely because a mineral patent has been issued for a tract of land, all operations undertaken thereon at a later time are not necessarily mining operations so far as the mill site law is concerned.

We find this conclusive of the issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed as modified.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

JOSEPH W. GOSS, *Member*.

¹ See *United States v. Alvis F. Denison et al.*, 71 I.D. 144 (1964), and the cases there cited, for the various circumstances under which a valid discovery may be lost with the passage of time.

ESTATE OF CHARLES FIRST
SOUND, A/K/A CHARLES
TRACK NO. 2 (DECEASED FORT
PECK ALLOTTEE NO. 3550)

2 IBIA 159

Decided January 29, 1974

Appeal by Raymond Track from the Order Determining Heirs After Re-opening of Estate, Disallowing Claim and Directing Distribution, entered April 11, 1973, by Administrative Law Judge William E. Hammett.

Affirmed.

130.0 Indian Probate: Appeal:
Generally

Where an appellant fails to specify any error made by the Administrative Law Judge in his findings of fact, conclusions of law, or order, and, upon review of the record, the Board finds substantial evidence to support such findings, the decision and order of the Administrative Law Judge will be affirmed.

390.0 Indian Probate: State Law:
Generally

Under Montana statute, R.C.M. 1947, § 91-404, pertaining to inheritance to and from illegitimate children, a father may not inherit from his illegitimate child unless (1) the father, after marrying the mother, has adopted the illegitimate into his own family, or (2) the father, after marrying the mother of the illegitimate, acknowledges his paternity.

APPEARANCES: Raymond Track, of Wolf Point, Montana, pro se.

OPINION BY MR. DOANE

INTERIOR BOARD OF
INDIAN APPEALS*Factual and Procedural
Background*

Charles Track, also known as Charles Afraid of His Track, Fort Peck Indian Allottee No. 1106, sometimes hereinafter referred to as, "the father," died April 30, 1965. Said decedent, during his lifetime, was married three times. His first wife bore him one child who died in infancy. He had five daughters and two sons by his second and third wives. During the third marriage, one Lena First Sound, also known as Tena First Sound and also as Tena Bearskin First Sound, to whom Mr. Track was never married, bore him an illegitimate son. The illegitimate son, named Charles First Sound, Fort Peck Indian Allottee No. 3550, also known as Charles Track #2, is sometimes hereinafter referred to as, "the son."

The son predeceased the father, having died intestate, unmarried and without issue on April 12, 1952. The father never adopted the son, or brought him into his home, or in any other manner contributed to his care or support.

In the course of the probate of the son's estate, which consisted solely of his allotment of Indian trust lands upon which oil was discovered, the Examiner of Inheritance, on January 12, 1953, determined that half of the son's estate was inherited by the father and the other

half by the mother, the aforesaid Lena First Sound. An Order for Distribution of the son's estate in equal shares to the mother and father was thereupon duly issued.

Subsequently, after the father's death in 1965, substantial controversy developed among the father's heirs regarding the distribution of his estate. One of the disputes which arose during the probate proceedings involved the validity of a claim against the father's estate by Lena First Sound for reimbursement of a proportionate share of support provided by her to the illegitimate son during his lifetime. Her claim was allowed by the Examiner in the amount of \$27,000 and ordered to be paid from the royalties derived from the oil production realized from a lease of the lands allotted to the son.¹

An appeal was ultimately taken to this Board from a decision of the Secretary, dated June 29, 1971, affirming the Examiner's decision with respect to Lena's claim as well as with respect to other issues. The matter before the Board was designated as the Estate of Charles Track, Deceased Fort Peck Allottee No. 1106, Probate No. K-61-69-S, and was assigned Docket No. IBIA 72-5. In its decision, dated March 15, 1972, 1 IBIA 216, 79 I.D. 83, the Board questioned the correctness of the determination by the

¹ In allowing this claim, the Examiner, among other things, stated: "This is in lieu of the claim for not only the full amount of all royalties received from the property, before and after decedent's death, but also the title to the minerals which this examiner is powerless to award."

Examiner, in the probate proceeding of the son's estate, that the father was a legal heir of the illegitimate and entitled to one-half of the estate.² Among other things, the Board concluded in such decision that, since the son died intestate the Montana statute pertaining to inheritance rights to and from illegitimate children applied,³ and construed such statute to require the marriage of the parents of the illegitimate as a factor prerequisite to establishing a right in the father to inherit from the estate of the illegitimate.⁴

Based upon the foregoing conclusions of law and the factual background outline above, and pursuant to the authority reserved to the Secretary in 25 CFR 1.2 and 43 CFR 4.242(h),⁵ the Board ordered a reopening of the Estate of Charles First Sound, deceased Fort Peck Allottee No. 3550. The Board directed, in substance, that the reopening was to afford all interested parties an opportunity to present evidence and legal argument, if any they might have, why the half interest from the Charles First Sound allotment obtained by Charles Track should not be deleted as an asset from the estate of Charles Track, and why the

entire allotment should not be awarded to Lena First Sound in lieu of her claim against the Estate of Charles Track for the care and support of Charles First Sound.

Pursuant to such Order, Administrative Law Judge,⁶ William E. Hammett, after due notice to all interested parties, did reopen such estate and held a hearing, September 15, 1972. At such hearing, some of the heirs of Charles Track, including Appellant, appeared in person and others appeared by counsel. After considering the evidence and arguments presented, the Judge concluded that Charles Track, the father, was not an heir at law of Charles First Sound, the son, and therefore, was never entitled to inherit any trust property from the estate of Charles First Sound. Accordingly, on April 11, 1973, the Judge entered his Order Determining Heirs After Reopening of Estate; Disallowing Claim and Directing Distribution. It is from such Order that Appellant herein has taken this appeal.

Contentions of Appellant

In substance, Appellant contends that there was a "common Indian marriage" between Charles Track and Lena First Sound in accordance with tribal custom and that the affirmance of the Decision and Order of the Administrative Law Judge

² See *Estate of Charles Track, a/k/a Charles Afraid of His Track*, 1 IBIA 216, 238, 79 I.D. 83, 89 (1972).

³ *Ibid.* 1 IBIA 216, 229; 79 I.D. 83, 89.

⁴ *Ibid.* 1 IBIA 216, 234; 79 I.D. 83, 91.

⁵ These regulations permit the Secretary (Board of Indian Appeals) to reopen an estate after three years have elapsed from the date of entry of a final decision in a probate proceeding for the correction of a manifest injustice.

⁶ The title, "Examiner of Inheritance," was officially changed to "Administrative Law Judge" pursuant to 38 F.R. 10939 (May 3, 1973, effective Aug. 19, 1972).

would work an injustice upon the Appellant and his family.

Issue Presented on Appeal

Whether the Administrative Law Judge erred by holding that Charles Track, the father, was not a legal heir of his illegitimate son, Charles First Sound, and therefore, not entitled to any inheritance from such son's estate.

Discussion

We have reexamined the legal conclusion reached in our decision of March 15, 1972,⁷ to the effect that, under Montana law, a marriage must take place between the father and mother of an illegitimate child in order to establish a legal right in the father to inherit from the illegitimate's estate. Neither Appellant, nor any other party in this proceeding, has cited any legal authority or persuaded us to the contrary. We, therefore, adhere to such previous holding.

Upon review of the record, the Board finds no evidence whatever, or any proffer of evidence, by Appellant or any other interested party, to the effect that Charles Track was at any time married to the mother of his acknowledged son, Charles First Sound. All of the parties, the attorneys, and public officials involved in the probate of the estate of Charles Track, seemed to accept as fact, without question, that

Charles First Sound was born out of wedlock to Lena First Sound while Charles Track was still married to his third wife, Mary Parnell. Although the record is clear that Charles Track never contributed to the care and support of such child, there is substantial evidence that he did acknowledge publicly, before a Tribal Council, the paternity of such child. However, the fact of acknowledgment of paternity, by itself, is not sufficient to confer upon the father any entitlement in the estate of his illegitimate son in the absence of a marriage to the mother.

The Board takes official notice, particularly, of the testimony of Elizabeth Brown, daughter of Charles Track, presented before the Examiner of Inheritance on June 16, 1965, in the course of the probate proceedings of the estate of Charles Track. At page five of the transcript of her testimony, counsel states, "The Examiner wants to know if Charles Track was ever married to Lena First Sound?" The witness, Elizabeth Brown, replies, "No, she wasn't married to him." On the same day in the same proceeding, another witness, Thomas Buckles, at pages eight and nine of the same transcript, testified that he had known Charles Track, "since we were both born" (for 82 years); that he and Charles Track were first cousins; that he was acquainted with the marriages, children, and family of Charles Track; that he was a disinterested witness and not

⁷ See n. 3, *supra*.

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expecting anything from the estate; that he had heard the testimony given by Elizabeth Brown concerning the family of Charles Track; and that such testimony was "all correct."

The Appellant, Raymond Track, was given every opportunity to present evidence and legal argument to prove his assertion that Charles Track was married to Lena First Sound. He failed to do so. Consequently, the Board finds that Appellant's contention here amounts to nothing more than a self-serving declaration and is without any evidentiary support whatsoever.

On the basis of the records of the above-entitled matter and the estate of Charles Track, the Board finds that Charles Track was never married to Lena First Sound, by an Indian common marriage or otherwise, and that Charles First Sound was the son of Charles Track and Lena First Sound, born out of wedlock. We, further, find that administrative due process has been accorded all the interested parties.

No other issue having been raised in this appeal, we, therefore, conclude that the Findings of Fact, Conclusions of Law, and Order of Judge Hammett were correct, and further, that he did not err in holding that Charles Track was not a legal heir of his illegitimate son, Charles First Sound, and not entitled to any inheritance from such son's estate.

Order

WHEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS HEREBY ORDERED:

(1) That the Order Determining Heirs After Reopening of Estate, Disallowing Claim and Directing Distribution, entered April 11, 1973, in the above-entitled matter by Judge Hammett, be, and the same HEREBY IS AFFIRMED;

(2) That a copy of this decision, together with a copy of Judge Hammett's aforesaid Order of April 11, 1973, be inserted into the official departmental file in the matter of the Estate of Charles Track, a/k/a Charles Afraid of His Track, Deceased Fort Peck Allottee No. 1106, Probate No. K-61-69-S, Docket No. IBIA 72-5; and

(3) That the Superintendent of the Fort Peck Indian Agency forthwith execute, or cause to be executed, the necessary administrative action to carry out such Order, as it applies, respectively, to the estates of Charles First Sound and Charles Track aforesaid.

This decision is final for the Department.

DAVID DOANE, *Alternate Member.*

I CONCUR:

MITCHELL J. SABAGH, *Member.*

SPICKLER COAL COMPANY**3 IBMA 26***Decided January 29, 1974*

Appeal by the Mining Enforcement and Safety Administration from an Administrative Law Judge's order, dated November 9, 1973, dismissing Docket No. MORG 73-98-P for want of jurisdiction.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge correctly dismisses a petition for hearing and formal adjudication for want of jurisdiction where the petition is insufficient due to failure to list properly the alleged violations in issue and to show proof of service, and after notice, the operator fails to cure the defects within a reasonable period of time.

APPEARANCES: Assistant Solicitor, J. Philip Smith, Esq., Trial Attorney, I. Avrum Fingeret, Esq., for appellant, Mining Enforcement and Safety Administration.

**MEMORANDUM OPINION
AND ORDER**

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

On November 9, 1973, an Administrative Law Judge dismissed Frank Spickler's petition for hearing and formal adjudication, on behalf of the Spickler Coal Company, for want of jurisdiction. The petition had been filed on September 7, 1972, and was deficient in that there

was no listing of the alleged violations in issue and no proof of service. 43 CFR 4.509, 4.541. Although the petitioner below was repeatedly apprised of the deficiencies and received detailed instructions with respect to the regulatory requirements for the content and service of a petition, there was no satisfactory response. In light of these circumstances, the Judge concluded that Spickler had decided to abandon his petition and dismissed the case.

The Mining Enforcement and Safety Administration (MESA) appeals from the order of dismissal, claiming that it was erroneous under 43 CFR 4.512(b). MESA insists that the Judge was precluded from dismissing the petition without its concurrence.

We are of the opinion that where an insufficient operator—initiated petition is filed, there is no jurisdiction to assess penalties. When an operator, despite notice, fails to cure the defects after a reasonable period of time has elapsed, as in the case at hand, dismissal is the proper course of action by the Judge. We are further of the view that MESA's reliance upon 43 CFR 4.512(b) is misplaced inasmuch as Spickler did not file a specific motion seeking withdrawal. *See Farrell Mining Company*, 3 IBMA 1, 81 I.D. 6, CCH Employment Safety and Health Guide par. 17, 126 (1974).

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

(UNALLOTTED PUEBLO, DECEASED)

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CFR 4.1(4)), the order of the dismissal in the above-entitled docket IS AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

**ESTATE OF DENNIS DELGADILLO
(DELG) (UNALLOTTED PUEBLO,
DECEASED)**

2 IBIA 170

Decided *January 30, 1974*

Appeal from an Administrative Law Judge's decision after rehearing.

Affirmed.

**165.0 Indian Probate: Claim Against
Estate: Generally**

A claim which was not filed within the time required by the regulations cannot be allowed.

**165.15.1 Indian Probate: Claim
Against Estate: Timely Filing: By
Other Than U.S. Agency**

A claim of a creditor filed after the date of the hearing must be rejected.

APPEARANCES: Edward S. Dunn, Esq., for appellant, Virginia Delgadillo Jacobson.

OPINION BY MR. WILSON

*INTERIOR BOARD OF
INDIAN APPEALS*

This matter comes before the Board on an appeal by Virginia Delgadillo Jacobson through her at-

torney, Edward S. Dunn, from an Administrative Law Judge's order affirming decision after rehearing pursuant to 43 CFR 4.291.

According to the record Dennis Delgadillo, hereinafter referred to as decedent, died intestate on March 16, 1968.

A hearing was held on June 13, 1968, by Hearing Examiner Kent R. Blaine (title since changed to Administrative Law Judge) to determine heirs or probate will and to consider creditor's claims. No claims were considered since none were filed. Thereafter, the examiner on June 28, 1968, issued an order determining heirs.

The appellant, *pro se*, on July 16, 1968, filed a petition for rehearing to consider her funeral claim in the amount of \$1,297.61.

Administrative Law Judge John F. Curran on April 20, 1972, reheard the matter. Thereafter, on May 26, 1972, the Judge issued an order from which the appeal herein was taken. In his order the Judge rejected the appellant's claim for funeral expenses on the grounds: that it had not been timely filed under the regulations in force at the time of the hearing.

The appellant in her appeal alleges no error on the part of the Judge in his findings of May 26, 1972. Appellant in her appeal merely reiterates allegations made in her petition for rehearing dated July 16, 1968.

The regulations in force at the time of the hearing held on June 13,

1968 (25 CFR 15.23(e)), clearly precluded consideration of claims filed after the conclusion of the hearing. The cited section of the code, *supra*, reads as follows:

No claims filed after the conclusion of the hearing shall be considered unless the claimant can present satisfactory proof that he had no actual notice of the hearing and that he was not on the reservation or otherwise in the vicinity during the period when the public notices of the hearing were posted. (Italics supplied.)

The record clearly indicates the appellant appeared at the hearing held June 13, 1968, and served as the principal family witness. Her testimony, *inter alia*, included the following.

Q. [Examiner] Are there any debts or bills that should be considered as bills against this estate?

A. No, not that I know of.

The Department over the years has consistently rejected claims against Indian estates that have not been timely filed. *Estate of Zate-kau-kau-komah* (Frank Odlety), IA-145 (October 8, 1954); *Estate of Oscar Bad Warrior*, IA-173 (April 11, 1955).

In the case at bar it is quite evident that the appellant's claim was not timely filed and the Board so finds. Accordingly, the appellant's appeal should be dismissed and the Judge's order of May 26, 1972, affirmed.

In view of the Board's finding we see no reason to pass on the merits of the appellant's request in the al-

ternative that she be awarded decedent's land in lieu of her claim.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal filed by Virginia Delgadillo Jacobson is hereby DISMISSED and the Administrative Law Judge's decision of May 26, 1972, IS AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member*.

I CONCUR:

DAVID J. McKEE, *Chairman*.

UNITED STATES v.
BYRON N. GARDNER ET AL.

14 IBLA 276

Decided January 30, 1974

Appeal from a decision by Administrative Law Judge L. K. Luoma¹ in Arizona contests 1342, 1343 and 1344 declaring appellant's three mining claims null and void.

Affirmed as modified.

Mining Claims: Generally—Act of August 4, 1892

The Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), authorizes the entry of lands chiefly valuable for building stone under the provisions of law in

¹ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge." 38 F.R. 10939, May 3, 1973, effective August 19, 1972.

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relation to placer mineral claims, and such entry may be made regardless of the form in which the deposits are found.

Mining Claims: Generally—Act of August 4, 1892—Words and Phrases

"Building stone, chiefly valuable for." Building stone as used in the Act of August 4, 1892, 30 U.S.C. § 161 (1970), includes stone used for building, for structural work and for other similar commercial purposes, but land chiefly valuable for the supply of stone to be manufactured into artifacts is not chiefly valuable for building stone under the Act.

Mining Claims: Discovery: Marketability

To constitute a valid discovery upon a mining claim there must be shown to exist, within the limits of the claim, a deposit of minerals in such quality and quantity as would warrant a prudent man in expending his labor and means with a reasonable prospect of success in developing a valuable mine.

Mining Claims: Determination of Validity

Where a mining claimant has located a number of claims, he must show a discovery on each claim to satisfy the requirements of the mining law as to that claim.

APPEARANCES: Byron N. Gardner, pro se, and on behalf of appellants;² Richard L. Fowler, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellee.

² Notice of appeal was filed by Byron N. Gardner, presumably representing himself, Eleanor Gardner and Cecil Goodwin. (Tr. 2.) Appellants' "argument and evidence" filed June 1, 1972, recites that it is filed for "Unique Onyx Placer Mining Claims Association."

OPINION BY MR. GOSS

INTERIOR BOARD OF LAND APPEALS

Appellants have appealed from a decision by Administrative Law Judge L. K. Luoma dated March 30, 1972, declaring null and void their three mining claims—the Unique Onyx placer, the Hazel D #1 lode and the Unique Onyx #1 placer—located within the Coconino National Forest, Coconino County, Arizona. The claims were located after July 23, 1955. The Judge determined *inter alia* that the mineral deposits on the claims in contest did not meet the test of uncommonness and, therefore, the deposits were not subject to location under the general mining law after the passage of the Act of July 23, 1955, *as amended*, 30 U.S.C. § 611 (1970). The Board does not reach the question of whether the stone is a common variety under section 611.

Unique Onyx Placer Claim

The Government charged that the Unique Onyx placer claim had been improperly located as a placer. At the hearing, the mineral deposit on such claim and the deposit on the Hazel D #1 lode were described by Gilbert J. Matthews, a Forest Service mining engineer, as lode deposits. (Tr. 126–128.) Appellant Gardner also agreed that such was the nature of the deposits. (Tr. 177.) The Judge found that the deposits on the claims were lode deposits and con-

cluded that for such reason the Unique Onyx placer claim was not subject to location as a placer.

While stone from the claim has been sold for fireplace rock, fireplace slabs and as rubble for plastic table tops, appellants have found that it is more profitable to manufacture the stone into such artifacts as clocks, pen sets, bookends and ashtrays. (Tr. 27-29, 162.) Appellants are in the process of phasing out the selling of rough material and are concentrating on the selling of finished products. (Tr. 162.)

Appellants argue on appeal that under 36 CFR 251.4 and the Act of August 4, 1892 (27 Stat. 348), 30 U.S.C. § 161 (1970), the Unique Onyx placer claim was correctly located as a placer claim. Section 251.4 is not applicable for it pertains to disposal of materials not subject to disposal under the mining laws. The Act authorizes placer locations of lands "chiefly valuable for building stone," irrespective of the form in which the deposits occur. 1 *American Law of Mining*, § 5.21 (1968). Section 1 of the Act provides in part:

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Appellants assert they were informed by an attorney and the Forest Service that a deposit of building stone should be located as a

placer. Appellants were justified in acting upon the asserted information only if the lands embraced by the Unique Onyx placer were "chiefly valuable for building stone."

The Supreme Court in *Cole v. Ralph*, 252 U.S. 286, 295 (1920), stated:

* * * But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral * * * and to sustain a placer location it must be of some other form of valuable mineral deposit * * *. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. * * *

Appellants' pleadings did not allege that the lands embraced by his Unique Onyx Placer Claim were chiefly valuable for building stone and, hence, properly locatable as a placer. The Government presented a prima facie case that the claimed discovery was of a lode or vein. The burden was, therefore, upon appellants to allege and show by affirmative defense that under section 161 the placer claim is chiefly valuable for building stone.

In *A Dictionary of Mining, Mineral, and Related Terms*, U.S. Bureau of Mines (1967) at 149, the term "building stone" is defined to be:

a. Any stone used in masonry construction, generally stone of superior quality that is quarried and trimmed or cut into regular blocks. *A.G.I. Supp.* b. Includes all stones for ordinary masonry construction, ornamentation, roofing, and flagging. Countless different kinds of rocks are used. Practically all varieties of igneous, sedimentary, and metamorphic rocks are included, but a few varieties stand out prominently because of

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their durability and widespread occurrence. In its broader sense, the term includes stone in any form that constitutes a part of a structure; however, cut or rough-hewn blocks for exterior walls are most widely used. *Stokes and Varnes, 1955.*

When appellants' stone is used for construction of fireplaces, it is used as building stone but when used for artifacts it is not used as building stone.³ The two values for the stone herein concerned may be compared to the value of a lode of valuable mineral ore. While such ore may have a value as a building stone or as fill, it is most valuable for the mineral therein; hence, such a lode may not be located as a placer building stone claim. In the case of the Unique Onyx placer claim, the evidence shows the land is chiefly valuable not for building stone, but for

the supply of stone to be manufactured into artifacts. Because the record discloses (Tr. 128, 177) that the deposits on the Unique Onyx placer and the Hazel D #1 lode were lode deposits, such claims could properly be located only as lode claims. *Cole v. Ralph, supra.* Therefore, we must hold that the Unique Onyx placer claim is invalid because it was not subject to location as a placer.

Hazel D #1 Lode Claim

As to the Hazel D #1 lode, its validity depends on the showing of a discovery of a valuable mineral deposit within the limits of such claim.

The tests for determining whether such a discovery has been made are the prudent-man rule and the marketability test. The prudent man rule was first laid down by the Department in *Castle v. Womble, 19 L.D. 455, 457 (1894)* in which it was stated:

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; the requirements of the statute have been met. * * *

The rule has been approved a number of times by the Supreme Court of the United States, most recently in *Coleman v. United States, 390 U.S. 599 (1968)*. That case also approved the complementary test to the prudent-man rule, the so-called marketability test. The Court stated in *Coleman* at 600, 602:

³ Under *McGlenn v. Wienbroer, 15 L.D. 370, 374 (1892)*, land which contains a deposit of stone that is not only useful for general building purposes but is also valuable for the ornamentation of buildings, for monuments and other commercial purposes may be entered as a placer claim. The Department has also stated in *Stanislaus Electric Power Co., 41 L.D. 655, 660 (1912)*, that the Act of August 4, 1892:

"* * * was intended to and does apply only to deposits of stone of special or peculiar value for structural work, such as the erection of houses, office buildings, and such other recognized commercial uses as demand and will secure the profitable extraction and marketing other commercial purposes may be entered as of the product. * * *" While stone used in the erection of houses and for other general building purposes is clearly building stone, the two cases indicate that stone used for certain other commercial purposes may also be considered as building stone. It must be presumed, however, that the words "chiefly" and "building" were included in the Act in order to fulfill a Congressional purpose. Because of the limitations of the statute, the words "other commercial purposes" and "recognized commercial uses" in the two decisions must necessarily relate to the use of the stone for construction of various structures.

* * * The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"—the so-called "marketability test."

* * * * *

* * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

(Footnotes omitted.)

Matthews examined the Hazel D #1 lode claim in 1964 and 1966, and he observed it in 1971. (Tr. 19-20.) He testified that there was only one area, termed a crevasse, in which travertine was exposed on the Hazel D #1 lode. (Tr. 49, 92.) When questioned as to his opinion on whether there was a discovery of mineral on each of the claims which would justify a prudent man in expending his time and money with a reasonable prospect of success in developing a paying mine, he stated that the easily accessible stone had been removed and that more costly mining would now be entailed. (Tr. 77-78.)

At the hearing appellants presented samples of their "unique onyx;" however, apparently none

were taken from the Hazel D #1 lode. (Tr. 129.) While appellants introduced evidence relating to sales of stone and profits made from such sales, there was no breakdown of such figures as they related to any individual claim.

The law is clear that there must be a discovery on each claim and a mining claimant must show as to each claim that he has found a mineral deposit which satisfies the tests for discovery. *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972), modified in 13 IBLA 256 (1973).

Appellants herein did not offer any evidence as to the amount or nature of the mineral deposit on the Hazel D #1. The evidence submitted was of a general nature relating, apparently, to all the claims. It is not enough to offer evidence for the claims as a unit. *United States v. Block*, 12 IBLA 393, 80 I.D. 571 (1973).

We find that appellants have failed to show a discovery of a valuable mineral deposit on the Hazel D #1 lode claim, and for that reason the claim is null and void.

Unique Onyx #1 Placer Claim

Appellant Byron Gardner admitted that no mining activity had taken place on the Unique Onyx #1 placer claim. (Tr. 179.) The Judge found the claim was invalid because there was no exposure of the claimed valuable travertine-onyx within the boundaries of the claim. (Tr. 65-66.) We agree with that finding.

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Appellants' other arguments have been reviewed and are found not to warrant reversal of the decision below.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the de-

cision appealed from is affirmed as modified.

JOSEPH W. GOSS, *Member.*

WE CONCUR:

FREDERICK FISHMAN, *Member.*

EDWARD W. STUEBING, *Member.*

*February 1, 1974***CITY OF PHOENIX****v.****ALVIN B. REEVES ET AL.****14 IBLA 315***Decided February 1, 1974*

Appeal from decision by Administrative Law Judge L. K. Luoma, declaring placer mining claims null and void.

Affirmed as modified.

Administrative Procedure: Adjudication — Administrative Procedure: Hearings—Hearings—Mining Claims: Hearings—Rules of Practice: Hearings

The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit.

Administrative Procedure: Adjudication—Mining Claims: Contests—Mining Claims: Determination of Validity— Mining Claims: Withdrawn Land—Rules of Practice: Private Contest

The Department of the Interior has jurisdiction to determine if a mining claim is invalid by being located on land not subject to mineral location, even where the issue of validity of the claim is raised in the context of a private contest brought by a surface patentee.

Administrative Practice—Executive Orders and Proclamations—Rules of Practice: Generally—Statutory Construction: Generally

Executive orders have the force and effect of law and rules of statutory construction apply to them.

Administrative Practice—Executive Orders and Proclamations—Mining Claims: Lands Subject to—Patents of Public Lands: Effect—Rules of Practice: Generally—Statutory Construction: Implied Repeals—Withdrawals and Reservations: Generally

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to nonmetalliferous location under the mining laws.

Act of July 15, 1921—Conveyances: Generally—Mining Claims: Lands Subject to—Patents of Public Lands: Reservations

Where the United States disposes of public lands with a reservation of minerals to the United States, the reserved minerals are not subject to location under the general mining laws in the absence of specific statutory authority. Minerals reserved to the United States in a patent to the City of Phoenix issued pursuant to the Act of July 15, 1921, 42 Stat. 143, are not subject to the mining laws, as neither that Act nor any other statute provides for disposition of the reserved minerals under the mining laws.

Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of—Withdrawals and Reservations: Revocation and Restoration
A mining claim located on land closed to mineral entry is void.

APPEARANCES: Bruce F. Demaree, Esq., of Richmond, Ajamie, Fay & Warner, Phoenix, Arizona, for appellant, Donald W. Lindhelm, Esq., for appellees.

*OPINION BY
MRS. THOMPSON*

*INTERIOR BOARD
OF LAND APPEALS*

Alvin B. Reeves, and the heirs of A. H. Reeves,¹ deceased (contestees), have appealed from the October 17, 1972, decision of Administrative Law Judge L. K. Luoma holding their A & H Nos. 3 and 4 placer mining claims null and void for the reason that the sand and gravel deposits were not reserved to the United States, but had been conveyed as part of the surface estate to the City of Phoenix.

On March 19, 1965, the City of Phoenix (contestant) initiated a private contest to have the A and H Nos. 3 and 4 placer mining claims embracing the S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$ of section 23, T. 1 N., R. 2 E., G. & S.R.M., Maricopa County, Arizona, declared invalid. A hearing was held on May 5, 1969.

The contestees base their claim to the land on location notices filed and recorded in the office of the County Recorder, Maricopa County, Arizona, on May 24, 1955. The City of Phoenix bases its title to the land on Patent No. 832934 issued to the City by the Bureau of Land Management on November 18, 1921.

Prior to the issuance of the patent, Executive Order No. 3388, January 22, 1921, temporarily withdrew the land in question.

* * *, from settlement, location, sale and entry, for classification and in aid of legislation granting said lands to the city of Phoenix, Arizona, for municipal purposes, and *this order shall remain in full force until revoked by the President, or by an act of Congress.* (Italics added.)

This order withdrew the land from nonmetalliferous mineral location. On July 15, 1921, Congress authorized the transfer of this land to the "City of Phoenix for municipal purposes * * * [reserving] to the United States all oil, coal or other mineral deposits found at any time in the land, and the right to prospect for, mine and remove the same * * *." Act of July 15, 1921, P.L. No. 67-34, 42 Stat. 143 (Act). Under the authority of the Act, patent was issued to Phoenix.

At the hearing, counsel for the United States made an appearance and filed a motion to intervene. This was denied. Although the United States did not appeal from that decision, in order to correct the error, we note that the denial of the motion was improper. The United States has an interest in determining the validity of mining locations where alleged rights to minerals reserved to the United States are asserted by claimants under the mining laws, 30 U.S.C. § 21 *et seq.* (1970). This is especially true in this case where one of the issues involved in the private contest was whether the sand and gravel deposits were encompassed in a mineral reservation to the United

¹ Genevieve C. Rippey, Leroy Reeves, and Thelma Reeves.

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States. The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in adjudications where time and public interest permit. 5 U.S.C. § 554(c)(1) (1970). The United States was an interested party and the public interest would have been served by permitting it to intervene.

The question of the authority of this Department to determine the validity of these mining claims has been brought into sharp focus by appellants' first contention. They contend the Judge's decision should be set aside and the contest dismissed because the land has been patented and consequently the Department does not have jurisdiction to determine the rights between the two private parties to the sand and gravel resources. They rely on *Berg v. Taylor*, 51 L.D. 45 (1925), where the Department held that questions pertaining to a conflict between a surface patentee and an applicant for a coal lease concerning the use of the surface estate are a matter beyond the jurisdiction of this Department and a matter for the courts. In *Berg* and in *Marathon Oil Co. v. West*, 48 L.D. 150 (1921), cited in *Berg*, this Department invoked its authority to grant mineral leases, despite protests by surface owners, leaving the issues as to conflicts in the possession and use of the surface for the courts. The instant case, however, does not involve Departmental interference with surface users' rights where the initial validity of the mineral users'

right under federal law was presupposed, as it was in *Berg* and *Marathon*. Here the question is whether the mining claims are *valid* under federal law. The *Berg* and *Marathon* rationale does not apply to this question. This case is also outside the ambit of circumstances requiring court proceedings to determine rights as between conflicting claimants under the mining laws. See 30 U.S.C. § 30 (1970); *Ti, Inc. v. Minnesota Mining and Manufacturing Co.*, A-31106 (Supp.) (July 2, 1969), *modifying* A-31106 (January 16, 1969).

It is well established that this Department has authority to determine the validity of mining claims located under the mining laws of the United States. *E.g.*, *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37 (1963). Where a mining claim is void because it was located on land withdrawn from mineral entry, this Department may, without bringing a contest, declare the claim void *ab initio*. *Dredge Corp. v. Penny*, 362 F. 2d 889, 890 (9th Cir. 1966); *Foster Mining and Engineering Co.*, 7 IBLA 299, 304-05, 79 I.D. 599, 602 (1972); *Ernest Alpers*, A-30627 (March 10, 1967). This Department has jurisdiction, therefore, to determine if a claim is located on land not subject to mineral location even where the issue of validity is raised in the context of a private contest brought by a surface patentee. See *United States v. Williamson*, 75 I.D. 338, 343 (1968). *Cf. Davis v. Nelson*, 329 F. 2d 840, 846 (9th Cir. 1964).

Appellants next contend that the Judge's decision declaring the claims invalid was in error, and that the sand and gravel deposits are locatable deposits, because the City of Phoenix would have a common law right of action for damages against them for any injury to the surface estate, bringing the case within the ambit of *United States v. Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971). Further, they contend the land is located in a river-bed subject to sporadic flooding which precludes any permanent development upon the surface estate, and that the City of Phoenix has recognized this fact by planning construction of a flood control channel using the mineral estate. They request this Board to hold that they have a right to remove any sand and gravel which does not conflict with the surface use. In view of our conclusions discussed below, we find it unnecessary to respond to these particular contentions.

In their brief to the Judge, appellants contended that the Act of July 15, 1921, revoked Executive Order No. 3388 and restored the lands to mineral entry and location. Phoenix raised a subsidiary issue of whether the sand and gravel placer claims are void because they are part of the surface estate patented to the City and not part of the mineral estate reserved to the United States.

The Judge, relying on *United States v. Isbell Construction Co.*, *supra*, decided that although the mineral estate on the land in question would be open to location under

the general mining laws, the sand and gravel located there was not part of the mineral estate reserved to the United States, but part of the surface estate granted to Phoenix. Accordingly, he held the claims invalid.

The land involved in *Isbell*, however, was clearly open to location under the mining law, including nonmetalliferous claims. 43 U.S.C. § 315e (1970); Executive Order No. 6910 of November 26, 1934, *as amended* by Executive Order of November 26, 1935, 55 I.D. 401. Here, before we can decide whether the sand and gravel in the land is subject to the mining law, we must first decide whether the land was open to location. If the Act of July 15, 1921, and issuance of the patent to Phoenix, or other administrative action, did not revoke Executive Order No. 3388 and restore the land to mining location, then the land has been closed to entry since January 22, 1921, and any claims located thereafter would be void. This threshold issue, whether reserved minerals are withdrawn, or are otherwise locatable under the mining laws, was not present in the *Isbell* case, and for that reason it is distinguishable. In view of our ruling on this threshold issue, *infra*, we are not deciding whether the sand and gravel deposits fell within the mineral reservation.

The status of the land is reflected in part by the Bureau of Land Management (BLM) records. The historical index covering this township shows the Executive Order, the Act

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of July 15, 1921, and the issuance of the patent to Phoenix. Mining claims are void where the official public land records show the land was not open to location at the time of entry. *Leo J. Kottas*, 73 I.D. 123, 127-28 (1966), *aff'd sub nom. Lutz-enhiser v. Udall*, 432 F. 2d 328 (9th Cir. 1970); *David W. Harper*, 74 I.D. 141, 145 (1967).

On the question of whether these mining claims are void as located for minerals which have been withdrawn and never restored to location, the Judge accepted an argument that the Act of July 15, 1921, and issuance of the patent to the City of Phoenix, subject to a mineral reservation, fulfilled the purpose of the temporary withdrawal and thus effectuated a restoration of the minerals to location. That conclusion is erroneous. At the very least, it must rest upon an implied repeal of the withdrawal by the action of Congress, as the language of the Act of July 15, 1921, does not expressly revoke the withdrawal or authorize mineral location upon the minerals to be reserved.

The withdrawal was by executive order. Executive orders have the force and effect of law, *Farkas v. Texas Instrument, Inc.*, 375 F. 2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Feliciano v. United States*, 297 F. Supp. 1356, 1358 (D.P.R. 1969), *aff'd*, 422 F. 2d 943 (1st Cir. 1970), and rules of statutory construction apply to them. *Feliciano*, *supra*, at 1359; *United States v. Angcog*, 190 F. Supp. 696, 699 (D.C. Guam. 1961).

Repeal of an executive order or statute may be either express or implied. However, there is a strong presumption against implied repeal. One statement of this policy is that if two statutes cover the same area and are not absolutely irreconcilable, effect is given to both. *United States v. Borden Co.*, 308 U.S. 188, 198 (1938). Another expression is that a law will not be construed as impliedly repealing another law "unless no other reasonable construction can be applied." *United States v. Jackson*, 302 U.S. 628, 631 (1938). *See Ely v. Velde*, 451 F. 2d 1130, 1134-35 (4th Cir. 1971); *Feliciano*, *supra* at 1359.

In construing executive orders, the Department of the Interior has implicitly recognized the presumption against implied repeal. Neither the mere passage of time nor accomplishment of an avowed purpose has been held to be a substitute for formal revocation of the withdrawal and restoration of the lands to location or entry under the mining or other public land laws. *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432, 445 (9th Cir. 1971); *Tenneco Oil Co.*, 8 IBLA 282, 284 (1972); *Rowe M. Bolton*, 5 IBLA 226, 227 (1972); *Grace Kinsela*, 74 I.D. 386, 387 (1967). It is, in part, because of this policy that the official records do not reflect any revocation or restoration.

As stated previously in this case, the Act did not expressly revoke the executive order; it made no

mention of it at all. Under this circumstance, the repeal of the order, if it occurred, must have been implied. However, the grant of the patent to Phoenix with a mineral reservation to the United States did not mandate the revocation of a temporary withdrawal order and the restoration of the withdrawn land to mineral location, because the Government could have good and sufficient reasons to both grant the patent and retain the withdrawal as to the reserved minerals. The two are not absolutely irreconcilable and under rules of statutory construction, effect must be given to both. *United States v. Borden Co.*, *supra*. This conclusion is strengthened by the fact the withdrawal was for classification purposes as well as in aid of legislation for the City of Phoenix. This militates against any argument that the Act of July 15, 1921, constituted a revocation of the withdrawal order and restoration of nonmetalliferous reserved minerals to location under the mining laws. Neither the Act nor subsequent administrative action purported to make any classification or restoration. See *Ernest Alpers*, *supra*.

There is a further compelling reason why the contestees' locations under the mining laws for the reserved minerals are void. The mining laws are applicable to public lands and such lands may be purchased by the claimant when he has made a discovery of a valuable mineral deposit within his mineral location on public lands. 30 U.S.C. § 21 *et seq.*

(1970). When public lands are disposed of with a reservation of minerals to the United States, it has been ruled that without specific statutory authority making the reserved minerals subject to the mining laws, the mining laws do not apply to such deposits. *Solicitor's Opinion*, M-36279 (July 19, 1955). This *Opinion* discussed the applicability of the mining laws to minerals reserved in a patent to the City of Denver. The act authorizing the patent, Act of August 25, 1914, 38 Stat. 706, was similar to that involved in this case as it provided that minerals were to be reserved to the United States, but gave no authorization of the right to mine such minerals under the mining laws. The *Opinion* concluded that authority to dispose of the minerals under the mining laws could not be read into the statutory provision for reserving the minerals. It distinguished other statutes where the United States has granted the land, reserving the minerals, and specifically authorizing location of the minerals under the mining laws. The rationale of that *Opinion* is applicable here. The Act authorizing the patent to the City of Phoenix while reserving minerals did not authorize their location under the mining laws. We know of no other statute making such an authorization. Consequently, the mining laws are not applicable to the reserved minerals in the patent.

Under either of the above views, the reserved minerals were not subject to location under the mining

laws. Therefore, as the withdrawal was never revoked nor the land restored to location under the mining laws for the reserved minerals, they were not open to appropriation under the mining laws at the time the contestees made their locations. *Terza Hopson*, 3 IBLA 134, 138 (1971). *See Dredge Co.*, 64 I.D. 368, 374-75 (1957), *aff'd*, 362 F. 2d 889 (9th Cir. 1966); *Ernest Alpers*, *supra*; *Frank Melluzzo*, 72 I.D. 21 (1965). Therefore, the claims must be deemed invalid. *E.g. Mickey G. Shaulis*, 11 IBLA 116 (1973); *Brace C. Curtiss*, 11 IBLA 30 (1973).

The Judge's decision is set aside and modified to the extent it is inconsistent with this decision and the claims are declared void for the reasons stated in this decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

ITMANN COAL COMPANY

3 IBMA 29

Decided February 7, 1974

Appeal by Itmann Coal Company from a decision dated August 23, 1973 (HOPE 72-115-P) by an Adminis-

trative Law Judge, assessing a civil monetary penalty of \$66 for four violations of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Computer Printout

A Notice of Non-Compliance is an official government record and will support a Notice of Violation of section 202 of the Act.

APPEARANCES: Timothy M. Biddle, Esq., Ivan Michael Schaeffer, Esq., John A. Macleod, Esq., and James T. Hemphill, Jr., Esq., in behalf of appellant, Itmann Coal Company; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, J. H. O'Donnell, Esq., Trial Attorney, in behalf of appellee, Mining Enforcement and Safety Administration (MESA).

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

On this appeal: "Appellant contends that the Administrative Law Judge's decision of August 23, 1973, is erroneous as a matter of law because his finding of the occurrence of a violation with respect to each of the two respirable dust Notices was not based on a preponderance of the reliable, substantive, and probative evidence. The Administrative Law Judge concluded as a mat-

¹ 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

ter of law that Appellant must pay a civil penalty based on facts supported solely by uncorroborated documentary evidence which was first generated by the Government and then used as MESA's only evidence to prove its allegations in this case."

Thus, the only issue in this case is whether the Administrative Law Judge was correct in his determination that the Notices of Non-Compliance (computer printouts) which were offered to establish the two alleged violations of the respirable dust control standards under section 202 of the Act, and 30 CFR 70.100(a), were entitled to probative value sufficient to support such violations.

Recently, this Board in *Castle Valley Mining Company*, 3 IBMA 10, 81 I.D. 34 (1974) dealt with this issue and held in pertinent part:

* * * It is our view that the Notice of Non-Compliance creates a prima facie case (a presumption of the truth) of the facts asserted therein. Of course, such presumption may be dissolved upon the production of rebutting evidence. * * *

We have reviewed the entire record and considered the briefs of the parties,² and finding no rebutting evidence, we are of the opinion that our holding in *Castle Valley*, *supra*, is dispositive of this case. Therefore, the Board concludes that

² Oral argument was requested by Appellant; however, due to the nature of the question presented and the thoroughness of the briefs filed by the parties, the Board has decided that oral argument would serve no useful purpose.

the decision of the Administrative Law Judge should be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision of the Administrative Law Judge IS HEREBY AFFIRMED; and Itmann Coal Company pay \$66 on or before 30 days from the date of this decision.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

COVERAGE OF PROJECTED ANNUAL EXPENSES IN BUREAU OF RECLAMATION POWER RATEMAKING STUDIES

Power: Rates

For the purpose of power ratemaking for Reclamation projects the rate and repayment study must show that the proposed rates will produce sufficient revenues in each year of the study (except for a possible initial short transition period) to cover operation and maintenance expenses during the year, including purchased power and wheeling but excluding depreciation and replacements, together with the required interest cost for the year except as interest may be deferred and capitalized in accordance with sound business principles. This is a minimum requirement, and it is independent of the requirement for repayment of the construction investment.

M-36874

February 15, 1974

**OFFICE OF THE SOLICITOR
ENERGY AND RESOURCES**

TO: ASSISTANT SECRETARY—LAND
AND WATER RESOURCES.

SUBJECT: COVERAGE OF PROJECTED
ANNUAL EXPENSES IN BUREAU OF
RECLAMATION POWER RATEMAK-
ING STUDIES.

You have requested an explanation of the legal requirements which apply to the coverage of projected annual expenses in connection with the process of setting power rates by the Bureau of Reclamation. This question has arisen in connection with the rate revisions for the Central Valley Project. Studies showed that rates which would be at the level approximately sufficient to pay off each increment of construction investment within 50 years produced deficits in meeting annual expenses in 18 or 20 years of the study period. The principal cause for this is the high cost of purchased power for CVP relative to other operating expenses and relative to the construction investment, together with the assumption that these costs will cease well before the end of the pay-out period. The legal question is whether the applicable statutes allow rates to be set notwithstanding one or more years of such annual deficits or whether the rates must be set high enough to eliminate some or all of such deficits even though the result is that construction costs

are paid off ahead of time and a substantial surplus is created.

The applicable law is contained in section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1187, 1194, 43 U.S.C. 485h(c), I F. Recl. & R.L.A. 647 (1972). It provides in relevant portion as follows:

* * * Any sale of electric power * * * shall be * * * at such rates as in his [the Secretary's] judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: * * *

It is readily apparent that the statute refers to three separate components of cost—"operation and maintenance cost," "interest," and "fixed charges." The particular subject of the present inquiry is the first two.

A review of the legislative history demonstrates that the words "an appropriate share of" refer to the cost allocation process and are intended to designate the costs or investment allocated by the Bureau of Reclamation to the power purpose of the project rather than to the purposes of irrigation, navigation, flood control, etc.¹

Incorporating this change into the words of the Act, your question

¹ See "Reclamation Project Act of 1939: Hearings before the Committee on Irrigation and Reclamation of the House of Representatives on H.R. 6773 and H.R. 6984," 76th Cong., 1st Sess., 26-7, 34, 140 (1939); 84 CONG. REC. 10220 (1939); H.R. Rept. No. 1252, 76th Cong., 1st Sess. 2 (1939).

involves an interpretation of the statutory requirement upon the Secretary that—

* * * the power rates shall be such "as in his judgment will produce power revenues at least sufficient to cover the annual operation and maintenance cost" allocated to power and "interest on the construction investment" allocated to power "at not less than 3 per centum per annum."

Upon reviewing the meaning of words of the statute by themselves and in relation to the Reclamation laws and other power ratemaking statutes, we conclude that for the purpose of power ratemaking the rate and repayment study must show that the proposed rates will produce sufficient revenues in each year of the study (except for a possible initial short transition period) to cover operation and maintenance expenses during the year, including purchased power and wheeling but excluding depreciation and replacements, together with the required interest cost for the year except as interest may be deferred and capitalized in accordance with sound business principles. This is a minimum requirement, and it is independent of the requirement for repayment of the construction investment.

*The plain meaning of the
statutory words*

Two elemental rules of statutory construction are that the words of the statute will be given their plain

meaning and that each word or phrase will be given effect. 50 Am. Jur., Statutes §§ 225, 231. Application of these rules to the words and phrases here yields a very straightforward result, as shown by the analysis that follows.

The first phrase is "*as in his judgment will produce*" certain power revenues. The inclusion of the reference to the Secretary's "judgment" is significant. It means that the Congress did not require that the rates must in fact produce a certain amount of revenues but only that in the Secretary's judgment they will produce these revenues. Thus the law looks not to yesterday or today, but to tomorrow.

This is a significant difference. Ratemaking is a process that involves predicting the future. In the rate and repayment study various judgments have to be made as to the likelihood and magnitude of future events, such as the amounts of sales, operating and construction costs, and project pumping load, the in-service dates of new powerplants, the outcome of contract negotiations, and so forth. Also, in the case of hydroelectric projects, judgments must be made as to the expected runoff into the reservoirs, based on normal weather conditions and anticipated diversions, to support estimates of the amount of generation. These judgments must be informed and rational, based upon adequate studies and the opinions

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of qualified experts.² But if events develop differently than had been anticipated—for example, if costs escalate more rapidly than normal or an extended drought occurs—and as a result of these abnormal circumstances a deficit in fact occurs, there is no violation of the law. However, it is incumbent upon the Secretary to regain a no-deficit position within a reasonable transition period.

The next key phrase is “*at least sufficient.*” It means that the stated test is a minimum, not a maximum. The power revenues, actual or predicted, may lawfully exceed the listed requirements.

For revenues “*to cover*” costs means that they must equal or exceed them and thereby reimburse the Treasury for these expenses. For revenues “*to cover the annual*” cost additionally indicates that the revenues must equal or exceed these costs in the same year in which incurred. Operation and maintenance costs are by their nature recurring costs, and the inclusion of the modifier “*annual*” is not necessary to define them.³

² The word “conclusive” was included before “judgment” throughout the bill drafted by the Department of the Interior and introduced on June 19, 1939, by Rep. White as H.R. 6773 and on June 12 by Sen. O'Mahoney as S. 2591. It was deleted by the House committee in executive session on June 24 and was omitted when White introduced the amended bill, H.R. 6984, on June 26. Hearings, *supra*, at 149.

³ The only other possible reason for including “annual” might be to distinguish O&M costs that do not occur annually (such as those due to unusual flood damage) from those that do; but this is not sensible because it suggests that, since they also are not “fixed charges,” they are not reimbursable at all, a

Finally, the term “*operation and maintenance cost*” would be given its customary meaning under standard accounting practice and business usage.⁴ Thus, it would include such expenses as payroll costs for plant operators and maintenance personnel, administrative expenses, supplies, repairs, utilities, purchased power, and wheeling. It would not, however, include depreciation, which for repayment purposes would fall into the category of a “fixed charge” relating to capital investment and be subject to Secretarial discretion.⁵ The same would be true of expenditures for replacements.⁶

result not in keeping with the congressional intent; and because a rate and repayment study never anticipates an extraordinary loss, or expense in any specific year.

⁴ The Bureau keeps books in accordance with the F.P.C. uniform system of accounts in accordance with section 303 of the Federal Power Act, 16 U.S.C. § 825b, which requires it to do this “so far as may be practicable.” Thus, this classification system would govern except where inconsistent with other provisions of Reclamation law or practice.

⁵ The depreciation of a capital item in standard cost accounting serves a function similar to the repayment of capital investment under the repayment requirements of law. The FPC “operation and maintenance expense accounts” include the items listed in the preceding sentence but do not include the “depreciation expense” account or the various categories of interest expense.

⁶ It could be argued that replacements are a maintenance expense attributable to ordinary wear and tear, particularly in view of the facts that the Bureau of Reclamation traditionally budgets replacements as an operation and maintenance expense and includes the cost of replacements in operation and maintenance charges for water users. However, inasmuch as they obviously are capital items and are accounted for as such in the FPC accounts, it cannot be said that section 9(c) definitely includes replacements within the term “annual maintenance cost” for purposes of determining the minimum rate requirements.

In summary, the plain meaning of the words is that the rates must be high enough so that, in the Secretary's judgment, when applied to anticipated generation and sales, they will produce revenues at least sufficient each year to equal the operation and maintenance cost that year, but this does not include depreciation or replacements.

As to the second component of cost, the Secretary is also required to set rates which in his judgment will produce revenues at least sufficient to cover interest on the power construction investment at not less than 3 percent per year. It is worthy of note that the modifier "annual" does not appear before the word "interest," thus suggesting that, contrary to the operation and maintenance cost, the annual interest cost need not be covered each year. On the other hand, the broad discretionary phrasing relating to "other fixed charges" does not extend to interest, thus suggesting a limit on the degree to which recovery of annual interest charges could be postponed. This subject is further discussed below in relation to the 1944 Flood Control Act.

The Context of the Reclamation Laws

The Reclamation Project Act of 1939 is one of the major enactments of general application that comprise the Reclamation laws. Its primary impetus was the report⁷ of the Reclamation Commission established

pursuant to the Act of August 21, 1937, 50 Stat. 737. This report contained numerous recommendations to relieve irrigators from hardship in paying construction charges and to improve other aspects of project management. The bill, which was drafted by the Department of the Interior, also sought to set forth the principles that would apply to the formulation, cost allocation, and cost reimbursement of new Reclamation projects generally, in recognition of the fact that they served multiple purposes and no longer were largely single-purpose undertakings. Unfortunately, no specific reference to the point under discussion has been found in the legislative history. However, the context of the Reclamation laws in which the provision dealing with power O&M costs throws some light on its meaning.

When the Reclamation program originated in 1902, it was contemplated that the irrigators would pay all of the operation and maintenance costs and would repay the entire construction investment without interest within 10 years.⁸ The repayment period for construction costs subsequently was extended to 20 years,⁹ then to 40 years,¹⁰ and, in the 1939 Act, an additional development period of up to 10 years was allowed.¹¹ When it was realized that

⁷ Reclamation Act, secs. 4 and 6, 32 Stat. 389, 1 F. Recl. & R.L.A. 51, 69; *Swigart v. Baker*, 229 U.S. 187 (1913).

⁸ Reclamation Extension Act, sec. 2, 38 Stat. 687, 1 F. Recl. & R.L.A. 187.

⁹ Omnibus Adjustment Act, sec. 46, 44 Stat. 649, 1 F. Recl. & R.L.A. 377.

¹¹ Subsection 9(d), 76 Stat. 407, 1 F. Recl. & R.L.A. 652.

⁷ H.R. Doc. No. 673, 75th Cong., 3d Sess. (1938).

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Reclamation dams offered opportunities for power development and that the power could be sold at a profit, that is, that power revenues would be more than sufficient to cover power operation and maintenance costs and repay the power construction investment, Congress determined that net power revenues should be used to assist the water users in meeting their financial obligations.¹² At the same time it was made clear that the power purpose was subordinate to the irrigation purpose.¹³ Thus power became irrigation's servant, not its equal or its master.

The distinction between operation and maintenance cost and the construction investment, and the difference between operation and maintenance charges to cover the former and construction charges to repay the latter, are a cornerstone of Reclamation law and practice.¹⁴ Although Congress has enacted numerous laws to relieve the irrigators of their obligations to pay construction charges, it has ameliorated the obligation to pay operation and maintenance charges only in a relatively few instances. In fact, the in-

sistence of Congress that the farmers pay operation and maintenance charges is so strong that these charges must be paid *in advance*, interest penalties of at least one-half percent a month are imposed for delinquent payments, and the delivery of water will be cut off if the payment is in arrears more than 12 months.¹⁵

In view of the firm congressional policies that irrigators are required to pay operation and maintenance charges in advance, with severe penalties for the failure to do so, and that power is subsidiary to water under Reclamation law, it would be surprising indeed if Congress intended in the 1939 Act to permit power users to postpone payment of power operation and maintenance costs beyond the year in which incurred.

Other Power Marketing Statutes

In a 1955 opinion the Attorney General ruled that the statutes under which the Interior Department markets power from Federal dams are *in pari materia*, that is, that they generally are taken from the same body of law and are to be construed together.¹⁶ The principal statutes referred to are the Reclamation

¹² Sec. 5, Act of April 16, 1906, 34 Stat. 117, 43 U.S.C. § 522, 1 F. Recl. & R.L.A. 111; subsection I, Fact Finders' Act, 43 Stat. 703, 43 U.S.C. § 501, 1 F. Recl. & R.L.A. 321.

¹³ Sec. 5 of the 1906 Act, note 12 *supra*; the last sentence of subsection 9(c) of the 1939 Act.

¹⁴ See, e.g., sec. 5, Reclamation Extension Act, 38 Stat. 687, 43 U.S.C. § 492, 1 F. Recl. & R.L.A. 191, and the statutes cited in notes 8-11 *supra* and note 15 *infra*. The term "fixed charges" in sec. 9(c) manifestly refers to construction charges.

¹⁵ Subsect. N, Fact Finders' Act, 43 Stat. 704, 43 U.S.C. § 493, 1 F. Recl. & R.L.A. 325; sec. 6, Reclamation Extension Act, as modified by subsec. H, Fact Finders' Act, 43 U.S.C. §§ 494, 495; sec. 6, Reclamation Project Act of 1939, 43 U.S.C. § 485e, 1 F. Recl. & R.L.A. 639; see also the current appropriation act language, 11 F. Recl. & R.L.A. 1024.

¹⁶ 41 Op. Atty. Gen. 236, 245 (1955).

Project Act of 1939 here under examination, section 5 of the Flood Control Act of 1944,¹⁷ and the Bonneville Project Act.¹⁸ In the 1955 opinion, which involved the disposition of power from an Army Corps of Engineers dam on the Savannah River in Georgia, the Attorney General in effect read into the 1944 Flood Control Act a provision from the Bonneville Project Act relating to preference customers.¹⁹

Section 5 of the 1944 Flood Control Act provides that the Secretary of the Interior shall dispose of power from projects of the Department of the Army not required for project operation. It provides in relevant part:

* * * [The Secretary of the Interior] shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles * * *. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. * * *

The first sentence quoted above is similar to language in section 6

of the Bonneville Project Act, and the second sentence is taken essentially verbatim from section 7.²⁰

The provisions of section 5 are comparable in many respects to those of section 9(c) of the Reclamation Project Act that were discussed earlier. Thus, the phrase "shall be drawn having regard to" is comparable to "in his judgment will produce" in section 9(c), that is, the rate studies must show compliance but the actual results may vary because of the occurrence of events which could not reasonably be anticipated. The Congressional debate shows that the phrase in parentheses was included to show that the principal need not be paid in predetermined annual payments as in conventional mortgages but that the amount of payment would vary from year to year with changes in water and market conditions.²¹ The "cost of producing and transmitting" the power comprehends both operation and maintenance costs and construction costs. The term "allocated to power" is equivalent to "appropriate share." The reference to "the amortization of capital investment over a reasonable period of years" serves the same purpose as "such other fixed charges as the Secretary deems proper." The phrase "amortization of capital investment" has been administratively interpreted, by both the Secretary and the FPC, on the basis of the legislative history, to include interest. The term "amorti-

¹⁷ 58 Stat. 890, 16 U.S.C. § 825s, II F. Recl. & R.L.A. 801.

¹⁸ 50 Stat. 731, 16 U.S.C. § 832 *et seq.*, I F. Recl. & R.L.A. 568.

¹⁹ The reference to other statutes is an aid in interpretation, but it cannot be used to amend the statute. For example, the interest rates on Reclamation projects cannot be less than the 3 percent specified in 9(c), and conversely, the interest rate on Army projects may be lower under the Flood Control Act.

²⁰ 50 Stat. 735, 16 U.S.C. §§ 832e, f, I F. Recl. & R.L.A. 574, 575.

²¹ 81 CONG. REC. 8524 (1937).

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zation" is akin to "depreciation" and buttresses the conclusion that the latter is not to be considered an operation and maintenance expense for purposes of ascertaining compliance with the ratemaking standards.

The fact that the amortization of only the capital investment is referred to suggests that operation and maintenance costs are not to be amortized, that is, that they are to be reimbursed as incurred and not deferred for later repayment.

The first sentence also must be considered. The key phrase is "the lowest possible rates to consumers consistent with sound business principles." This provision may illuminate the other requirements of law, but it does not supersede them. The word "possible" includes the meaning "legally possible"; the term "sound business principles" incorporates the other statutory requirements. Thus, for example, it is neither "possible" nor a "sound business principle" not to "cover the annual operation and maintenance cost," not to include interest on the power investment at Reclamation projects at a rate of at least 3 percent per annum, and not to amortize the power investment within a reasonable period of years. On the other hand, where the other statutory terms allow a discretionary range of action, the precept for "the lowest possible rates consistent with sound business principles" may be referenced for further guidance in the exercise of that dis-

cretion. For example, the absence of the modifier "annual" before "interest" in section 9(c) may be interpreted to allow the deferment of the annual interest charge where a good reason exists that is in accordance with sound business principles, including accepted utility accounting practice.²²

Statements of Repayment Policy

It has been suggested that the conclusion herein reached regarding coverage of annual operational costs is inconsistent with two statements of repayment policy, but an analysis of these statements shows this not to be the case. The first of these is found in H.R. Rept. No. 1409, 89th Cong., 2d Sess. 9-10 (1966), in connection with the third powerhouse at Grand Coulee Dam, where the House Interior Committee explained the Department's repayment study as follows:

The repayment study is based upon year-by-year forecasts of system revenues and costs over the repayment period. Revenues are applied first to pay the costs of operation, maintenance, replacements, and interest. All remaining revenues are applied to repay the capital investment in commercial power facilities, and irrigation assistance as it falls due. Accordingly, there is no annual schedule of capital repayment. The test

²² For example, the Bureau for convenience begins charging interest on the total joint costs allocated to power when the powerplant first becomes revenue producing. However, for purposes of ascertaining the minimum legal requirement, it would be permissible to capitalize a portion of this interest attributable to additional generating units until they become operational if this is shown to be in accordance with accepted utility accounting practice.

of the sufficiency of revenues is whether the capital investment can be repaid within the overall repayment period establish for each power project, each increment of investment in the transmission system, and each block of irrigation assistance. Hence, repayment may proceed at a faster or slower pace from year to year as conditions change. Annual operating costs and revenues, of course, may vary from year to year since they are affected by weather conditions, streamflows, current economic conditions, changing markets, and the absorption of new projects into the system.

This approach to repayment scheduling has the effect of averaging the year-to-year variations in costs and revenues over the repayment period. This results in a uniform cost per unit of power sold, and permits the maintenance of stable rates for extended periods. It also facilitates the orderly marketing of power and permits Bonneville Power Administration's customers, which include both electric utilities and electroprocess industries, to plan for the future with assurance.

This discussion focuses on the repayment of capital investment *after* operational costs are paid. This premise is stated succinctly in the first two sentences: In a year-by-year forecast of system revenues and costs, the revenues are applied *first* to pay the costs of operation, maintenance, replacements, and interest. There is no suggestion that the annual revenues would not be at least sufficient to cover the annual operation and maintenance cost.

The second policy statement to which attention has been called is the following paragraph from Part 583 of the Reclamation Instructions:

10 *Net Revenues.* The difference between total operating revenues, and the total revenue deductions is the amount of net revenues. This revenue is applied toward repayment of project investment costs, payable from power system revenues. In early years of project power system operations, the estimated net revenue may result in an annual deficit. Such deficits increase the interest-bearing repayable obligation.

The penultimate sentence suggests the possibility that in the early years of project power system operations the estimated "net revenue" may result in an annual deficit. However, the instructions explain that net revenues are arrived at only after interest and provision for replacement are deducted from estimated gross revenues. As indicated earlier, replacements are not included within "the annual operation and maintenance cost" which section 9(c) requires to be met, and interest may be capitalized in accordance with sound business principles. With the elimination of these items from the calculation, it is highly unlikely that any deficit would be experienced.

RICHARD K. PELZ,
Assistant Solicitor.

GERAL BEVERIDGE

14 IBLA 351

Decided *February 21, 1974*

Appeal from decision (NM 19445) of
New Mexico State Office, Bureau of

Land Management, rejecting oil and gas offer to lease.

Affirmed.

Oil and Gas Leases: Generally—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Known Geological Structure—Oil and Gas Leases: Lands Subject to

A noncompetitive oil and gas offer to lease must be rejected where either before or after the filing of the offer and prior to the time of the issuance of the lease the land is determined as of that time to be within the known geologic structure of a producing oil or gas field, even though such offer may have been conditionally approved prior to the inclusion of the land within such structure.

Oil and Gas Leases: Known Geological Structure

The Geological Survey's definition of the known geologic structure of a producing oil or gas field will not be disturbed in the absence of a clear and definite showing that the definition was improperly made.

It is not necessary that every piece of land defined as being on a known geologic structure be productive; such a structure is the trap, whether structural or stratigraphic, in which an accumulation of oil or gas has taken place and the limits of the structure are the known or inferred limits of the trap.

Accounts: Payments—Oil and Gas Leases: Rentals

The payment of advance rental in connection with an oil and gas lease offer, and the acceptance of such payment by the Bureau of Land Management, do not create a binding obligation on the Bureau to issue an oil and gas lease.

APPEARANCES: R. C. Beveridge, Midland, Texas, for appellant.

OPINION BY MR. FISHMAN

**INTERIOR BOARD
OF LAND APPEALS**

Geral Beveridge has appealed from a decision dated October 17, 1973, rendered by the New Mexico State Office, Bureau of Land Management which rejected her oil and gas offer NM 19445.

The State Office decision rejected the offer on the basis that the land in issue "has been within the known geologic structure of the South Salt Lake Field in Lea County, New Mexico, since June 16, 1973. Therefore, this land may be leased only by competitive bidding as provided under 43 CFR 4120."

Appellant filed for parcel number 86, consisting of lot 11, section 1, T. 21 S., R. 32 E., N.M.P.M., New Mexico, pursuant to a notice dated August 20, 1973. A drawing was held on September 12, 1973, and appellant's card was drawn number 1 for the tract in issue. By memorandum of September 11, 1973, the Area Geologist of the Geological Survey at Roswell, New Mexico, notified the State Office that "[b]ased on development drilling in lot 12, [section 2] T. 21 S., R. 32 E., the following described lands are within an undefined addition to the South Salt Lake Field known geologic structure, effective June 16, 1973 * * *." Among the lands listed was lot 11, section 1, T. 21 S., R. 32 E., N.M.P.M., New Mexico.

On appeal appellant asserts that the land in issue "is not offset by

production" and that the Bureau of Land Management "acknowledged the lease sale by sending to * * * [appellant] a receipt for \$20.00" covering the advance rental, which acknowledgment is dated September 18, 1973.

A noncompetitive offer to lease certain land for oil and gas must be rejected where either before or after the filing of the offer and prior to the time of the issuance of the lease the land is determined as of that time to be within the known geologic structure of a producing oil or gas field, even though such offer may have been conditionally approved prior to the inclusion of the land within the limits of the geologic structure. *See James W. McDade*, 3 IBLA 226 (1971), *aff'd*, 353 F. Supp. 1006 (D.D.C. 1973); Solicitor's Opinion, 74 I.D. 285 (1967); *F. William Johnson, Jr.*, 3 IBLA 232 (1971).

We take appellant's first ground for appeal to suggest that the land is not within a known geologic structure of a producing oil or gas field. However, the Geological Survey's definition of the known geologic structure of a producing oil and gas field will not be disturbed in the absence of a clear and definite showing that the definition was improperly made. *McClure Oil Co.*, 4 IBLA 255 (1972); *Duncan Miller*, A-27737 (November 20, 1958). Nor is it necessary that every piece of land defined as being on a known geologic structure of a producing oil

or gas field be productive. The known geologic structure of a producing oil or gas field is the trap, whether structural or stratigraphic, in which an accumulation of oil or gas has taken place and the limits of the structure are the known or inferred limits of the trap. *Karl Bruesselbach*, A-28061 (October 26, 1959). Appellant's attack on the Geological Survey determination is a bare assertion of error; it, therefore, is insufficient. *Duncan Miller*, A-30300 (May 13, 1965).

Appellant's suggestion that the acceptance by the Bureau of the advance rental constituted a binding obligation to issue a lease, is clearly erroneous, since no rights to a lease accrue absolutely until the lease itself has been executed by the appropriate official of the Government. *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973). *See* 43 CFR 3112.4-1 and 43 CFR 3102.7. *See also, Dominic J. Repici*, 2 IBLA 14 (1971). *Cf. Udall v. Tallman*, 380 U.S. 1, 4 (1965), *rehearing denied*, 380 U.S. 989 (1965).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, *Member*.

February 21, 1974

UNITED STATES
v.
EUGENE STEVENS

14 IBLA 380

Decided February 21, 1974

Appeal from decision of Chief Administrative Law Judge L. K. Luoma in mining contest W-37335.

Affirmed.

Administrative Procedure: Adjudication — Administrative Procedure: Hearings—Constitutional Law: Due Process—Mining Claims: Contests—Rules of Practice: Government Contests

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act and the due process requirements of the Constitution.

Administrative Procedure: Adjudication — Administrative Procedure: Hearings—Constitutional Law: Generally—Mining Claims: Hearings—Rules of Practice: Hearings.

The fact that a hearing in a mining contest is conducted by an Administrative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient.

Administrative Procedure: Hearings—Constitutional Law: Generally—Mining Claims: Hearings—Rules of Practice: Hearings

There is no right under the seventh amendment of the Constitution to a jury trial in an administrative hearing on a mining contest, as that amendment does not apply to quasi-judicial administrative proceedings.

Mining Claims: Discovery: Marketability

In order to demonstrate a discovery of a valuable mineral, one must prove by a preponderance of the evidence the presence of minerals that would justify a prudent man in the expenditure of his labor and means with the reasonable prospect of success in developing a paying mine.

Mining Claims: Common Varieties of Minerals: Generally

Without evidence that stones similar to those found in great abundance elsewhere have a property giving them a special and distinct value, they are common varieties no longer locatable under the mining laws. The fact that stone may be tumbled and polished for rock hound purposes is not sufficient to meet the test.

Mining Claims: Generally—Mining Claims: Discovery: Generally—Mining Claims: Surface Uses

The sale of permits to rock hounds to collect stones on claimed lands is not a mining operation within the meaning of the mining law; income from the sale of such permits cannot properly be considered in determining if a discovery of a valuable mineral deposit has been made.

APPEARANCES: Eugene Stevens, pro se; George E. Longstreth, Esq., Office of the Regional Solicitor, De-

partment of the Interior, Denver, Colorado, for the United States, at the hearing only.

OPINION BY
MRS. THOMPSON

INTERIOR BOARD OF LAND
APPEALS

Eugene Stevens has appealed from a decision of Chief Administrative Law Judge L. K. Luoma dated May 10, 1973, which invalidated the claimant's Agate Nos. 1 through 200 lode mining claims. This block of contiguous claims was located in 1971 for gemstone, gypsum, uranium, and thorium. (Tr. 9-10.) In October 1972, the Bureau of Land Management (BLM) issued a complaint charging that the claims were not used for mining purposes, and that valuable minerals had not been found so as to constitute a discovery within the meaning of the mining laws. A hearing was held before Judge Luoma on January 11, 1973.

The Judge invalidated the 200 claims on three independent grounds: (1) that the "gemstone" chert on the claims is a placer deposit, and under the mining law a placer discovery will not sustain a lode location; (2) that the "gemstone" chert on the claims is a common variety material withdrawn from location under the mining law by the Act of July 23, 1955, 30 U.S.C. § 611 *et seq.* (1970); and (3) that even if the material were uncommon, the claimant failed to

show a discovery of a valuable mineral deposit.

Contestee contends generally that there are valuable locatable minerals on the claims. The main thrust of his appeal, however, is that his rights under the United States Constitution have been violated by the contest. He asserts, *inter alia*, that the Administrative Law Judge, because he is not in the Judicial Branch of the Government, is not empowered to deprive him of property under the fifth amendment, and that the hearing itself was unfair in that everyone involved except himself was "on the payroll of the Department of the Interior." He also asserts that he was deprived of the right under the seventh amendment of the Constitution to a jury trial provided for in courts of common law.

Concerning these threshold due process of law questions, we hold appellant's contentions lack merit. It is well established that this Department may determine the validity of mining claims by an administrative contest proceeding which provides the claimant the right to a hearing before a qualified hearing officer. *United States v. Coleman*, 390 U.S. 599 (1968); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920); *Davis v. Nelson*, 329 F. 2d 840, 846 (9th Cir. 1964).

Administrative due process in a mining contest is satisfied whenever a mining claimant is afforded adequate notice and an opportunity for

a fair hearing. *Best v. Humboldt Placer Mining Co.*, *supra*; *Cameron v. United States*, *supra*. Due process is assured in that the exercise of the Secretary of the Interior's plenary authority over the public lands, 43 U.S.C. § 1201 (1970), is subject to the normal process of judicial review. 5 U.S.C. § 702 (1970); *Orchard v. Alexander*, 157 U.S. 372, 383-84 (1895).

Judge Luoma is a qualified hearing officer authorized to conduct hearings under the Administrative Procedure Act, 5 U.S.C. § 556 (1970). The procedures followed in mining contests comport with the Act and the requirements of due process of law in the Constitution. *United States v. Gunn*, 7 IBLA 237, 79 I.D. 588 (1972); *United States v. Bass*, 6 IBLA 113 (1972); *United States v. Haas*, A-30654 (February 16, 1967), and cases cited therein.

Appellant has detailed no specific instance of bias or impropriety at the hearing; he has made only a general allegation that employees of the Department of the Interior would not act in his favor. Appellant's argument carried to its logical end would eliminate administrative proceedings by disqualifying all Departmental employees: the BLM mineral examiner who acts as a witness, the Administrative Law Judge, and this Board. Such an argument cannot be taken seriously. Appellant must show more than a visceral objection to establish unfairness in the contest.

A BLM mineral examiner who is a witness in a Government contest

against a mining claim is not disqualified nor is his credibility discredited merely because he is an employee of that agency, or because the contestee asserts that the witness will not testify in his favor. *United States v. Zerwekh*, 9 IBLA 172 (1973). See also, *Udall v. Snyder*, 405 F. 2d 1179, 1180 (10th Cir.), *cert. denied*, 396 U.S. 819 (1969). In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient. *Converse v. Udall*, 262 F. Supp. 583 (D. Ore. 1966), *aff'd on other grounds*, 399 F. 2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *United States ex rel. De Luca v. O'Rourke*, 213 F. 2d 759, 763 (8th Cir. 1954). This rule is equally applicable to Members of this Board who review the claimant's appeal and the Judge's decision. See 43 CFR 4.27(c); see also, *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236 (1947); *Texaco, Inc. v. FTC*, 336 F. 2d 754, 760 (D.C. Cir. 1964); *Berkshire Employees Association of Berkshire Knitting Mills v. NLRB*, 121 F. 2d 235, 238-39 (3d Cir. 1941). Therefore, the mere fact the witnesses, the Administrative Law Judge, and Members of this Board are employees of the Department of the Interior does not establish unfairness in the contest proceeding.

At the hearing, appellant had the right to cross-examine witnesses,

and to present evidence to establish his rights under the mining laws. Nothing in the hearing record evidences any unfairness or bias. Nor has appellant pointed to any error of law prejudicial to the result in this case.

Appellant's contention that he was denied his seventh amendment right to a jury trial is also without merit. Statutory rights adjudicated in administrative proceedings, such as mining claim contests, were unknown at common law, and the amendment does not extend to such quasi-judicial administrative proceedings. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937); *McFerrer v. County Board of Education of Fayette County*, 455 F. 2d 199, 202-03 (majority opinion), 205-06 (dissenting opinion) (6th Cir. 1972); *Lowry v. Whitaker Cable Corp.*, 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); *Melancon v. McKeithen*, 345 F. Supp. 1025, 1041 (E.D. La. 1972); *Farmers' Livestock Commission Co. v. United States*, 54 F. 2d 375, 378 (E.D. Ill. 1931); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 594 (1958).

We turn now to the question of the validity of the claims. Testimony by two expert witnesses for the Government detailed their examinations of the claims. Basically, they stated there were no mining workings on the claims and gave their opinions that there were no valuable mineral deposits exposed within the claims.

Discovery of a valuable mineral deposit is the *sine qua non* of the validity of a mining claim. *United States v. Coleman*, *supra*. In order to prove a discovery within the meaning of the mining law, 30 U.S.C. § 21 *et seq.* (1970), the claimant must show the discovery of such quantity and quality of minerals that

* * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894), *approved in*, *Chrisman v. Miller*, 197 U.S. 313, 322 (1905); *Best v. Humboldt Placer Mining Co.*, *supra*; *United States v. Coleman*, *supra*.

The testimony of the Government's witnesses was sufficient to establish a prima facie case of the invalidity of the claims for failure to make a discovery. The burden of proof was then upon the claimant to show by a preponderance of the evidence that a discovery had been made. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). This he failed to do.

There is no support in the record for appellant's assertions relating to discovery of valuable minerals locatable under the mining laws. The Government introduced evidence on the nature and extent of the calcium sulfate (gypsum) deposits and the presence or absence of uranium and thorium on the claims. Contestant's witness, Larry Steward, a Bureau of

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Land Management geologist, testified that he took four samples from calcium sulfate outcrops on Claims 65, 71 and 73, and the analytical report indicated that the material was at least partially anhydrite. (Ex. 24.) The evidence indicated, as the Judge found, that anhydrite deposits generally, and these in particular, have no current value for mining purposes. (Tr. 38, 57.)

During his examination of the surface of the claims, the geologist took scintillator (Geiger counter) readings and samples on the rock types he encountered. This examination disclosed no evidence of uranium or thorium. (Tr. 16-17.)

Appellant offered no evidence at all, and there is no serious assertion that valuable deposits of uranium or thorium have been found within any of the claims. Any assertion by appellant that the anhydrite material on the claims has any commercial value is self-serving conjecture without any substantiation, and contradicted by expert testimony. Nor was there any value shown for any other types of gypsum on the claims.

The only indication of any commercial value concerns the material described as cryptocrystalline varieties of silica, commonly called chert, which is scattered on the surface of some of the claims.

Appellant asserts that this material and agate found on the claims is gemstone in quality. It is evident that the stone is of such a hardness that it can be tumbled and polished, but such material is found in great

abundance not only on the claims, but also on nearby public lands, and in many other locations throughout the West. (Tr. 60, 64, 80.) The Government witness testified that any stone of "possibly a four or five and on up to a ten hardness on a Mohs' scale of hardness would provide a polish." (Tr. 22.) The market for the stone is for rock hound purposes, gathering and collecting, for curios, and for polishing and cutting to make into "gemstones" for jewelry or ornamental objects. The evidence did not disclose that the stones on the claims have any property giving them special or distinct value which takes them out of the category of a common variety within the meaning of 30 U.S.C. § 611 (1970). Without evidence that the stone is an uncommon variety within that Act, it is no longer locatable under the mining laws. *United States v. Coleman*, *supra*; *United States v. Melluzzo*, 70 I.D. 184 (1963). *See United States v. Cardwell*, A-29819 (March 11, 1964); *United States v. Shannon*, 70 I.D. 136 (1963).

The mere fact the stones may be polished is not sufficient to meet the uncommon variety test, as hardness, the prime requisite for polishing, is a property common to many types of stone found in great abundance. It is the value of the stone deposit as it is found on the claims that is the important factor, not any enhanced value which might be obtained for a fabricated or marketed product of the deposit. *McClarty v. Secretary of the Interior*, 408 F. 2d 907, 909 (9th Cir. 1969).

Appellant contends he has sold some rocks from the claims and that the value of the material is demonstrated by the activities of other individuals who have removed stones from the claims under permits he issued. However, the record does not disclose evidence of sales of the stone from the claims, but only of privileges granted by the claimant to others relating to the use of the land. Evidence regarding the value or the use of the land for other than legitimate mining purposes relates to the bona fides of the claimant and throws light on the true value of the land. See *United States v. Coleman*, *supra* at 603.

The evidence indicated that the major activity on the claims has been the posting of a number of signs, some of which read "Gemstone Enjoyment Mineral Claims," and "Removal of any Mineral * * * Without a Permit is Prohibited." Other signs erected by Gemstone Enjoyment indicate where Indian sites are located and other points of interest. (Exs. 8-23.) Gemstone Enjoyment is a commercial enterprise organized and operated by the contestee. For \$15 per year a permit is issued in the name of Gemstone Enjoyment entitling the holder and his family to enter and camp on the claims and remove any rocks or minerals up to a maximum of 150 tons per permit per year. Gemstone Enjoyment has advertised for members in the magazine *Lapidary Journal* (Ex. A), and has a brochure promoting the benefits of

membership and the nature of the claims. (Ex. 17.)

The evidence demonstrated that there was no market for the unprocessed material from the claim (*E.g.*, Tr. 15, 47-48, Ex. 25.) However, the contestee sold about \$1,000 worth of Gemstone Enjoyment permits during 1972. (Tr. 91.)

The income from the sale of Gemstone Enjoyment permits is not properly to be considered as income from a mining operation. See *South Dakota Mining Co. v. McDonald*, 30 L.D. 357, 360 (1900). As was stated in *United States v. Elkhorn Mining Co.*, 2 IBLA 383, 389 (1971), *aff'd*, *Elkhorn Mining Co. v. Morton*, Civ. No. 2111 (D. Mont., filed January 19, 1973):

However, not every profitable enterprise conducted upon the public lands entitles the entrepreneur to a patent under the mining laws. * * * The expenditure of means and labor must be for the benefit of a mining operation from which minerals can be extracted and marketed. The marketed commodity must be the product of this mining operation.

Here, the claimant is marketing permits, not mineral material. In fact, the claimant is charging the public to do what it has the right to do freely on public land. 43 CFR Part 6010. See also, 43 CFR 3621.1 (providing for the free use of minerals not for sale or barter); 43 CFR 3712.1 (restricting the use of unpatented mining claims). Gemstone Enjoyment is not a mining operation as contemplated by the general mining laws, and the income from its operation could not properly be

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considered in determining if a discovery had been shown on the Agate claims.

It is apparent from appellant's testimony that his expenses have been in hiring others to stake the claims for him, recording the location notices, and the printing of brochures and mailing and advertising costs for his Gemstone Enjoyment enterprise. These expenses totaled approximately \$2,000 for the 200 claims. (Tr. 91-92.) Asked if his agents who located the claims had found valuable minerals on the ground before the claims were located, he testified, "That I don't know. You are asking me what another man did." (Tr. 90.)

The only discovery effort on the claims shown by the claimant is as follows:

A. Well, I have done some pick and shovel work out there, investigative, and incidentally, as long as I am testifying under oath, I have found agate in stratified form at several different places on the claims. Not on every claim, because a lot of it is in the valley. I am speaking now of certain areas along the ridges. I did find that, and I can take somebody up and show them.

Q. But your market in this case is the coming on the land of people who have a \$15.00 permit; is that correct?

A. That is correct, yes, sir.
(Tr. 91.)

* * * * *

Q. Now, if these people that you sold permits to didn't come on the property, then what would you have done?

A. I beg your pardon?

Q. If these rockhounds that you have asked or suggested might want to come

on, and pay you the \$15.00 for a permit, and they come on each year with a permit, if they wanted to, is that the only market you have?

A. Outside of what I might sell by mail, yes, sir. Mining is very limited.
(Tr. 93.)

It is evident there has been no bona fide attempt to discover minerals, nor to develop a valuable mine, but only an attempt to promote the sale of claimant's "permits" to rock hounds and other recreationists.

The evidence clearly establishes that there has been no discovery of a valuable mineral deposit on any of the 200 claims covering the 4000 acres of land involved here. Proof of discovery as to each claim is required under the mining law. *United States v. Bunkowski*, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972); *United States v. Melluzzo*, 76 I.D. 181, 189 (1969). This has not been done by the claimant in order to sustain his burden of proof.

As the claims are invalid for lack of a discovery of a valuable mineral deposit locatable under the mining laws, it is unnecessary to consider whether the claims were improperly located as lodes rather than placers, and whether that issue was properly raised by the contest complaint. Therefore, we do not decide whether Judge Luoma's ruling on that issue was correct.

For the reasons discussed above, and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43

CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

**ADMINISTRATIVE APPEAL OF
JUANITA HUMPHREY MICHALEK
(CROW ALLOTTEE NO. 3292) v.
AREA DIRECTOR, BILLINGS ET AL.**

2 IBIA 175

Decided *February 26, 1974*

Appeal from an administrative decision.

REVERSED AND REMANDED.

Indian Lands: Allotments: Generally—Trespass: Generally

The Superintendent, as a representative of the Secretary, owes a duty to protect the land of a competent Crow Indian against livestock trespass so long as the land remains in trust status and is unleased.

APPEARANCES: Towe, Neely and Ball, Attorneys at Law, for appellant, Juanita Humphrey Michalek.

OPINION BY MR. WILSON

**INTERIOR BOARD OF
INDIAN APPEALS**

The above-entitled matter comes before the Board on an appeal by Juanita Humphrey Michalek through counsel, Towe, Neely and

Ball, from a decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated January 30, 1973, affirming the action of the Superintendent, Crow Agency, in refusing to initiate trespass penalty action under 25 CFR 151.24 on appellant's trust allotment No. 3292.

In brief, the basis of the appeal herein arises out of appellant's complaint to the Superintendent of the Crow Agency requesting that livestock trespass action against a non-Indian owner of cattle drifting onto her allotment be initiated. The Superintendent refused to take the requested action. In lieu thereof, the Superintendent made the following determination:

It is the decision of this office to assess voluntary trespass charges on the users of the land in the amount of \$1.40 per acre per year for damages. The damages will be assessed from the time the last lease expired until present. The collected charges will be placed in a special deposit account in your name and at your disposal.

The foregoing decision is made on the premise that you have several options at your disposal which this office considers adequate to protect your interests; and further that you are a competent Indian with capacity to handle your own affairs, and that imposition of penalties cited in CFR 25 151.24 (sic) would not be in your best interest or represent any adequate solution to your problem.

The Area Director affirmed the Superintendent's decision, hence, this appeal.

This appeal, directed to the Assistant Secretary of Indian Affairs, was by special delegation of authority, transferred to the Director, Office of Hearings and Appeals, on

MICHALEK (CROW ALLOTTEE NO. 3292) v. AREA DIRECTOR, BILLINGS ET AL.
February 26, 1974

October 4, 1973, for final determination. Appellate authority was delegated to the Board of Indian Appeals as an Ad Hoc Board by the Director, Office of Hearings and Appeals, under date of August 6, 1973. Copies of the aforementioned delegations were heretofore attached and made a part of the Notice of Docketing, dated November 2, 1973.

The appellant, in response to the Board's Notice of Docketing and Order to Show Cause, dated November 2, 1973, filed a brief together with sundry related exhibits. Neither the Area Director nor the other parties in interest have filed an answer denying or refuting the allegations set forth by appellant in her brief.

In support of her appeal appellant contends that the Superintendent owes (1) a competent Crow Indian the same duty of protecting him or her in the quiet enjoyment of his or her allotment as he owes an Indian who is *non compos mentis*. (2) It is the affirmative duty of the Superintendent upon filing of a complaint alleging livestock trespass to investigate and, if sufficient grounds exist, to prosecute and levy penalties prescribed in 25 CFR 151.24.

The Act of May 26, 1926 (44 Stat. 658), as amended, March 15, 1948 (62 Stat. 80), authorizes competent Crow Indians to lease their allotment without the assistance and approval of the Superintendent. 25 CFR 131.15 implements the fore-

going Act, *supra*, in the following language:

(a) Notwithstanding the regulations in other sections of this part 131, Crow Indians classified as competent under the Act of June 4, 1920 (41 Stat. 751), as amended, *may lease their trust lands* * * * for farming or grazing purposes without the approval of the Secretary pursuant to the Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80). * * * Approval of the Secretary is required on leases signed by Crow Indians not classified as competent * * *. (Italics supplied.)

We note that 25 CFR 131.15(e) casts full responsibility on a competent Crow Indian as lessor in obtaining compliance with any lease made. This section, however, we note further provides:

* * * This shall not preclude action by the Secretary to assure conservation and protection of these trust lands.

An examination of the record, as presently constituted, clearly indicates no basis in fact whatsoever to support the Superintendent's conclusions or reasons for refusing to act on appellant's complaint under 25 CFR 151.24. Accordingly, the Board so finds.

The Area Director, in affirming the Superintendent's decision and as reasons for denying and dismissing appellant's appeal, determined that since the appellant is a competent Crow Indian under 25 CFR 131.15, the Superintendent owed her no duty to protect her land against livestock trespass, notwithstanding appellant's land is held in trust and

notwithstanding that the complaint does not arise out of a competent Crow lease. The Area Director went on further to state:

Accordingly, your appeal is denied on the grounds that the demands you have made of the Superintendent are beyond the scope of his jurisdiction.

We find nothing in the Act of May 26, 1926, *as amended*, March 15, 1948, *supra*, and 25 CFR 131.15 that relieves the federal government of its trust responsibilities or jurisdiction with respect to allotted land. Only the issuance of a patent in fee could accomplish that result. This, however, is not the case at bar. The Superintendent under the Crow Competency Act, *supra*, and subsequent regulations, 25 CFR 131.15, is relieved of overseeing the leasing of trust lands by competent Crow Indians. Moreover, a competent Crow Indian under the foregoing regulation is fully responsible for obtaining compliance with the terms of any lease made by him. This section, however, goes on to state:

* * * This shall not preclude action by the Secretary to assure conservation and protection of these *trust lands*. (Italics supplied.)

In view of the fact that the appellant's land is held in trust and that her complaint does not stem from any lease agreement, we disagree with the Area Director's decision regarding loss of jurisdiction. On the contrary, we find the Bureau of Indian Affairs had jurisdiction over appellant's lands and that it was the affirmative duty of the Superintendent to take such measures as were necessary to protect ap-

pellant against livestock trespass on her allotted trust lands. *United States v. Fraser*, 156 F. Supp. 144 (D.C. Mont. 1957), *aff'd*, 261 F. 2d 282 (9th Cir. 1958). The District Court in *Fraser, supra*, in holding that the government is a proper party to bring an action for livestock trespass on allotted lands, notwithstanding the present lessee is a non-Indian, remarked:

* * * "It is the right and duty of the government to maintain such suits as may be necessary for the protection of its Indian wards. * * * And particularly is this true where the United States holds lands in trust for the use and benefit of these wards and suit is necessary for the protection of these lands," [citing cases]. 156 F. Supp. at 150.

It is settled law that by virtue of the peculiar "guardian-ward" relationship existing between the United States and Indian persons the Federal Government has not only the capacity, but also the *duty* to protect and enforce Indian rights in property held by it as trustee. *Federal Indian Law*, page 328, United States Department of Interior, United States Government Printing Office, Washington, D.C. (1958); *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886).

In view of the views hereinabove set forth the decision of the Area Director, Billings Area Office, Billings, Montana, must be reversed and remanded.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43

February 28, 1974

CFR 4.1, the decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated January 30, 1973, is hereby REVERSED AND the matter is REMANDED to the Area Director for the purpose of implementing the provisions of 25 CFR 151.24, and for whatever other action he deems necessary to protect the appellant's rights in her allotment.

This decision is final for the Department.

ALEXANDER H. WILSON, *Member.*

I CONCUR:

DAVID J. MCKEE, *Chairman.*

ADMINISTRATIVE APPEAL OF RICHARD OBI

2 IBIA 183

Decided February 28, 1974

Appeal from an administrative decision denying an application for the sale and purchase of land.

Reversed.

Indian Lands: Allotments: Alienation

When an Indian wishes to sell his allotment to his Indian mother who has ample means and the seller is in need, the Area Director must have cogent reasons for disapproval of the sale.

OPINION BY MR. MCKEE

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal filed by Richard Obi from the decision of the

Area Director, Portland, issued October 11, 1973, which in turn affirmed the Superintendent's decision of July 24, 1973, wherein application by the appellant to sell his Quinault allotment to Cecelia Obi, his mother, was denied.

The appeal was transferred to this Office pursuant to the delegation of authority issued December 14, 1973, amending 211 DM 13.7. The transmittal from the Area Director in Portland dated December 3, 1973, indicates that the appeal was timely filed although no date is mentioned. The appeal itself is undated, but it does bear the receiving date stamp of the Area Office of the Bureau of Indian Affairs showing November 12, 1973. The record discloses that the Area Director's decision of October 11, 1973, was mis-addressed to the appellant at Renton, Washington, whereas it should have been sent to Seattle, Washington. There is nothing to indicate when or how it was delivered to the appellant.

A finding is made that the appeal was timely filed and NOTICE IS HEREBY GIVEN that this appeal is hereby docketed by this Board for decision.

A further finding is made that although the record does not include copies of the application for sale of the allotment signed by Richard Obi or any document signed by Cecelia Obi, said record is sufficient upon which to base a decision. This appeal will therefore be disposed of immediately without requiring a filing of legal briefs or further statements.

The Superintendent's memorandum of November 28, 1973, to the Area Director includes the following statement, "His motivation for the above sale, at least in part, we believe has been a face-saving device." A review of the appeal itself lends considerable weight to this opinion although the appellant's motivation might be better described as an effort to preserve the self-respect which is essential to him.

The Area Director's statement that the appellant's mother is almost 95 years old and that she has in excess of \$200,000 in her individual Indian money account with ample current income to meet her needs, would suggest that the payment of \$8,250 for the appellant's allotment could not jeopardize her financial position. There is no suggestion in the Area Director's decision that Cecelia Obi is in any way incompetent, despite her age, and there is an indication that she has been generous to the appellant in the past. Whether or not he is indebted to her for some unstated amount is of no consequence.

The appellant states in his appeal, "Officials declare she is not in the land business, has no use for the land. I say that though she has land, I prefer to give her collateral for this sum *rather than accept another outright gift.*" (Italics supplied.) The appellant proceeds to describe his need for money.

It appears without contradiction: that the appellant does need funds; that he has a valuable asset which

he is willing to sell to gain the needed cash; that the purchase of the land by Cecelia Obi would in no way jeopardize her financial position; and that it is the desire of both parties to complete the transaction. No cogent reason for disapproving the application to sell has been stated by the Area Director.

A finding is made that the denial of the application to sell the land and to expend money to purchase the same are legal property rights of the appellant and his mother the exercise of which has been thwarted by the ruling of the Area Director. He has overreached in this matter. It is our conclusion that the transaction should be permitted to go forward at the earliest possible date.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and the delegation included in the December 14, 1973, amendment to the Departmental Manual, 211 DM 13.7, it is ORDERED that the application for sale of the allotment in accordance with its provisions be approved, and that the deeds necessary to complete the transaction be approved by the appropriate office of the Bureau of Indian Affairs.

This decision is final for the Department.

DAVID J. MCKEE, *Chairman.*

WE CONCUR:

ALEXANDER H. WILSON, *Member.*

MITCHELL J. SABAGH, *Member.*

March 5, 1974

**ESTATE OF MARY SOULIER (RED
CLIFF CHIPPEWA ALLOTTEE NO.
80 (180), DECEASED)**

2 IBIA 188*Decided March 5, 1974*

Petition for reopening to modify the Secretary's August 6, 1923, order directing the sale of land pursuant to decedent's will.

Denied.

**145.0 Indian Probate: Board of
Indian Appeals: Generally—375.0
Indian Probate: Reopening: Generally**

Under the delegations of authority by the Secretary to the Board of Indian Appeals in 43 CFR 4.1, the Board has authority and jurisdiction to correct or modify prior Secretarial orders issued in probate of Indian trust estates in accord with the statutes, court decisions and a showing of later-discovered facts.

**381.0 Indian Probate: Secretary's
Authority: Generally**

A provision in a will executed pursuant to 25 U.S.C. § 373 (1970) requiring sale of land interests held in trust is to be carried out by the Secretary in those situations where a refusal to do so would be an arbitrary or capricious abuse of discretion by the Secretary within the rule of *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598, 90 Sup. Ct. 1316 (1970).

**390.2 Indian Probate: State Law:
Applicability to Indian Probate,
Testate**

A provision in a will executed pursuant to 25 U.S.C. § 373 (1970) appointing an executor shall not be approved insofar as it would be effective upon property held in trust, but as to such property, the duties and directions given by the testator to the executor may be carried out by

the Secretary to avoid a defeat of the testator's intent, provided that the Secretary's function is in no way subject to the provisions or requirements of any state court or statute limiting or regulating the power and authority of a personal representative.

**415.0 Indian Probate: Trust Prop-
erty: Generally**

Following the doctrine of equitable conversion, a provision in a will executed pursuant to 25 U.S.C. § 373 (1970) requiring sale of land interests held in trust with the proceeds to be distributed, has the effect of changing the interests in the affected property from land to personalty requiring that the land if unsold or the proceeds of sale be distributed as personalty.

APPEARANCES: John D. Niemisto and John M. Wiley, Attorneys at Law for Alice Daley Niemisto, Franklin R. Basina, Constance Basina Kosberg, Idell Basina Duffy, Catherine Gordon, Frederick Gordon, Jr., William Gordon, Frank Gordon, Elizabeth Gordon, Lawrence Gordon and Marvin Gordon, and Elizabeth Hawkes, Attorney at Law for John Emmett Daley, petitioners; and

Mariana R. Shulstad of the Office of the Field Solicitor, Twin Cities, Minn., for Reginald P. Miller, Superintendent, Great Lakes Agency, Wisconsin, respondent.

**OPINION BY ADMINISTRATIVE
JUDGE McKEE**

**INTERIOR BOARD OF
INDIAN APPEALS**

This is a proceeding before the Board of Indian Appeals upon a

petition dated December 18, 1973, enclosed in a memorandum dated December 26, 1973, from Judge Vernon J. Rausch of Twin Cities, Minnesota. The petition includes the following language in the prayer:

WHEREFORE, your petitioners request an order vacating the Secretarial Order dated August 6, 1923 approving the Will of Mary Soulier and further disapproving of said Will, thereby permitting the lands owned by Mary Soulier at the time of her death to descend to her heirs.

In the memorandum of December 26, 1973, from Judge Rausch the said petition is correctly determined by him to be a petition for reopening of a probate which had been decided for more than three years. The Judge referred the petition to the Board under the provisions of 43 CFR 4.242(h) by which reopening authority of such estates is reserved to this Board.

The record submitted in connection with the petition includes pertinent parts of the probate proceedings in the Estate of Mary Soulier. It also includes the full record of the proceedings before Judge Rausch which were initiated by the Superintendent of the Great Lakes Agency upon the filing of his combined petition for correction of inventories in eight completed probates of estates of subsequently deceased individuals¹ who were either

legatees, or the successors in interest of deceased legatees of the said Mary Soulier. The Superintendent's petition was directed to the elimination from the inventories in those estates of any interests in the lands which had purportedly descended to or passed under the wills of the legatees of said Mary Soulier.

The petition for reopening filed in this proceeding would appear to be collateral to those proceedings initiated by the Superintendent in estates all of which have been closed for more than three years. A finding is made that all proceedings are subject to consolidation and determination by single decision issued by this Board. Accordingly:

NOTICE IS HEREBY GIVEN TO: All of the known and unknown heirs, legatees, devisees, and successors in interest of Mary Soulier deceased; to the Bureau of Indian Affairs; to all attorneys of record; and particularly to the petitioners and respondents, that this proceeding is hereby docketed under the above number.

STATEMENT OF FACTS

Mary Soulier, Allottee No. 80 (180) of the Red Cliff Band of Lake Superior Chippewa Indians received as her allotment the S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 1, T. 51 N., R. 5 W., of the 4th P.M. in Bayfield County,

¹ ESTATES OF: *Susan Soulier Daley Stute*, Red Cliff Chippewa, Probate A-71-53; *Theresa Agnes Soulier Basina*, Red Cliff Chippewa, Probate A-60-58; *Thomas H. Soulier*, Red Cliff Chippewa, Probate A-155-58; *John Soulier*, Red Cliff Chippewa, Probate A-61-63; *Susan J. Soulier Sagasunk*

Griffin Schaeffer, Red Cliff Chippewa, Probate A-45-66; *Antoine Edward Basina*, Red Cliff Chippewa, Probate A-162-66; *Duwayne Marshall Soulier*, Red Cliff Chippewa, Probate A-7-69; *Patrick William Daley*, Red Cliff Chippewa, Probate IP TC 85R 72.

ALLOTTEE NO. 80 (180), DECEASED)

March 5, 1974

Wisconsin, consisting of 80 acres for which a restricted fee patent, dated May 8, 1897, was issued under the provisions of the Treaty of September 30, 1854. She had 12 children, six of whom predeceased her. From one, Akin Lamorie, Allottee No. 74 (153), she inherited the allotment described as Lot 1, Sec. 8, T. 51 N., R. 3 W., and Lot 1, Sec. 36, T. 52 N., R. 5 W., both of the 4th P.M. in Bayfield County, Wisconsin, consisting of 67.24 acres. She also held certain other properties not here at issue.

On October 12, 1911, Mary Soulier executed a will which included the following provision:

3d I direct that my allotment on the Red Cliff Reservation, Bayfield County, Wisconsin, described as the South half of South East quarter of Section one (1) town (sic) fifty-one North of Range five West and the allotment of my son Akin Lamorie deceased of whom I am sole heir described as follows: Lot one of Section eight (8) township fifty-one North of Range three (3) West and Lot one (1) of section thirty-six, town fifty-two North of Range five West, be sold without unnecessary delay and the proceeds of such sale be divided equally among all my living children after first deducting therefrom one hundred (\$100.00) which I dedicate for Masses by the local pastor of the Catholic Church.

She died on April 16, 1914, and on August 4, 1923 her will was recommended for approval in accordance with the Act of June 25, 1910, 36 Stat. 855, *as amended* by the Act of February 14, 1913, 37 Stat. 678, by E. B. Meritt, Assistant Commis-

sioner. On August 6, 1923, the will was approved by F. M. Goodwin, Assistant Secretary of the Interior, who included the following order in his approval:

The estate of the decedent, consisting of her original allotment and her inherited interest in the allotment of her deceased son, Akin Lamorie, *are directed to be sold* by the Superintendent of the LaPointe Agency, Wisconsin, and all just debts against her estate be paid, including funeral expenses, if any, and \$100.00 be given to the local pastor of the Catholic Church, and the remainder of the cash divided among her devisees as above set forth. *No rights of an executor will be recognized.* (Italics added.)

For reasons unclear at this time, the Superintendent of the LaPointe Agency did not comply with the order of sale which has remained unchanged for 50 years. At the hearing held April 4, 1973 by Judge Rausch it was speculated that due to the inaccessibility of the land no buyer could be found.

It should be noted that no protest or appeal of the order for sale was filed following entry of the order approving the will. There has been no order of distribution of any money or of these interests in the land to any legatee, devisee, or heir. The purported distributions of the interests of legatees and devisees subsequently deceased is challenged by the Superintendent's action.

During the 50 years since the approval of the will of Mary Soulier, four of the six beneficiaries designated in paragraph 3d of the will

have died,² and at least four of the descendents of her children have died some testate and some intestate. There are not at least 60,³ including one or more non-Indians, individual successors in interest who have claims against the estate under the will. In the probate of the estates of the subsequently deceased interest holders, the interests derived from the decedent under this will were treated as interests in the land itself, and in 1970 a resume of the fractional interests of the purported tenants in common ranged downward from a 1/6 each in the surviving sons to a 1/1296 each in several of the more remote claiming relatives. An almost intolerable management and ownership situation thus exists as to both allotments.

The two surviving sons, James Curtain and Fred Curtain,⁴ have pressed the Superintendent of the Great Lakes Agency for a number of years to sell the land and distribute the money to them alone as the "living children" in compliance with the will and the order approving the will. A prospective purchaser was found, and in an attempt to remove a cloud from the title, the Superintendent requested Judge Rausch to proceed under 43 CFR 4.273 to delete the record of land interests from the estates of those de-

cedents who have died since the approval of the will. Accordingly, after issuance of a show cause order, a proper notice of a combined hearing was issued, and a hearing was held April 4, 1973. In addition to the Curtain brothers, certain of the other interest holders appeared at the hearing *pro se* and by attorney to resist the Superintendent's proposal to sell the land.

No order was issued by the Judge as to the eight estates in question following the hearing. This was for the reason that following the hearing, the resisting interest holders filed a consolidated motion for dismissal and this was in turn followed with their petition of December 18, 1973, seeking reopening of this estate pursuant to the provisions of 43 CFR 4.242(h). Since the final decision herein had been issued more than three years prior to the filing of the petition, the Judge properly transmitted the petition and the record to this Board.

The record includes the transcript of the hearing of April 4, 1973. Those opposing the Superintendent's proposed sale were represented variously by John M. Wiley, John Niemisto, a relative of one of the parties, and by Elizabeth Hawkes, all attorneys at law. Some parties including the Curtain brothers appeared *pro se* or by non-attorney family members. The Superintendent was not present or represented although two agency employees appeared as witnesses. The Field Solicitor, appearing for the first time for the Superintendent,

² Since the filing of the petition the Board is advised that Frederick J. Curtain, one of the two surviving children of Mary Soulier died testate January 1, 1974. No proceedings in probate of this estate have yet been instituted.

³ Notice of the death of Angeline Basina Vandervanter on May 20, 1973 was received by the Board February 4, 1974. There may have been other deaths not yet reported.

⁴ See note 1.

ALLOTTEE NO. 80 (180), DECEASED)

March 5, 1974

has filed a brief opposing the petitioner's motion to dismiss.

We note no dispute of any material issue of fact.

POINTS IN ISSUE

The petitioners oppose the sale, and seek to set aside the Secretary's order for sale issued August 6, 1923, on the following grounds:

That there are upwards of 60 "heirs" who claim an interest in the land in place of the 6 original beneficiaries named in the will resulting in fractional claims now as small as 1/1296 (the rationale of this argument escapes us here); that the land value has appreciated; that the sale will pass the land irretrievably to non-Indian people, contrary to federal policy; that the present communal use of the land (there is no allegation as to the number of users) would be destroyed; that permanent improvements placed on the land by at least one claimant would be lost; that the claimants have believed over the years that they held interests in the land; and that a sale would be improvident (without giving reasons).

The brief filed by the Field Solicitor for the respondent Superintendent was prepared prior to the filing of the petition to reopen, and it is, therefore, directed more to the issues originally raised in the effort to delete the lands from the eight inventories. However, upon review of the record as a whole, it is not now considered necessary to further

enlarge the issues or to provide opportunity for the filing of additional briefs.

The brief filed by the Field Solicitor raises several points including the proposition that estoppel is no bar to the proposed sale; that adverse possession against the U.S. does not mature into title or create rights; that "this tribunal" does have jurisdiction to modify inventories; that "this tribunal" has no jurisdiction to change a Secretarial order; and that none of the eight decedents in question held any interest in the real estate through the decedent's will.

The Field Solicitor's attack upon the jurisdiction of "this tribunal" to act for the Secretary in all of these matters is made without regard to the delegations of authority included in 43 CFR 4.1 and is unsupportable. Without dwelling on the issue unduly, it should be pointed out that precedent therefor does exist. In the past when probate jurisdiction was delegated to an Assistant Secretary, time limitations were waived, and new and different action was taken in the name of the Secretary, *Estate of Eliza Yellow Fox* (44953-35) (December 15, 1936); when delegated to the Solicitor, *Estate of Es Sun E Cly or Old Lady Sam*, IA-1278 (June 29, 1966); when redelegated by the Solicitor to a Regional Solicitor, *Estate of Charles Dowan, or Itoye-wanjina*, IA-D-32 (September 29, 1969); and when delegated to the Board of Indian Appeals, *Estate of*

Eliza Shield Him, 1 IBIA 80 (March 24, 1971). The new issues raised in each case were completely disposed of. Modifications of the findings and the distribution of the estates have been necessary in numerous instances to conform to later discovered facts or even subsequently issued court rulings.

The Field Solicitor does make a point which is to be considered here as controlling,

IV. None of the eight decedents held any interest in the subject real property at the time of their deaths.

DISCUSSION

This brings the requirement in this decedent's will into consideration when she said,

3d I direct that my allotment * * * and the allotment of my son * * * be sold * * * and the proceeds be divided among all my living children * * *.

This provision was implemented by the Assistant Secretary's Order approving the will, *Estate of Mary Soulier*, 120899-14 (August 6, 1923) where he said,

The estate of the decedent, consisting of (allotments) * * * are directed to be sold * * *. No rights of an executor will be recognized.

The directive in the will was in our opinion sufficient to convert the interest of the testatrix in the land to interests in personal property in accord with the doctrine of equitable conversion stated in the Chapter, "Conversion By Will" 5 Bowe-Parker: *Page on Wills*.

§ 46.1 Nature and definition:

Under proper circumstances * * * a direction in a will to change property from one legal class to another, as from real to personal or personal to real, will have the effect, in equity, of changing the legal character of such property at once before it is actually changed in fact. This doctrine, known by the name of equitable conversion, rests upon the maxim that equity looks upon that as done which ought to be done. * * * It applies wherever an obligation to sell or exchange land is created by contract, will, or court order. Prior to the actual sale or exchange and while the obligation continues in force, the courts will adjudicate the rights of the parties as they would have been if the conveyance had actually been made. [Principal footnote references omitted.]

The statement in the text is supported by the decision *In re Bisbee's Estate. Runke v. Bisbee*, 177 Wis. 77, 187 N.W. 653 (1922), cited in the footnote; and

§ 46.9 Effect of Conversion:

The effect of equitable conversion of property is to impress the property converted with the character of the property into which it is to be converted, even before a change in form, as far as is necessary to carry out the intention of the testator. If the will directs a conversion of realty into personalty, such realty must be distributed as if it were personalty. When conversion of realty has been effected, the devisees or heirs of the testator have no claim on the realty as such, * * *. The executor is entitled to such income as an asset of the estate. * * * Likewise, other statutory provisions relating to gifts of realty do not apply to a gift of the proceeds when the realty has been converted by a mandatory power of sale. * * * [Principal footnote references omitted.]

March 5, 1974

The statement in the text is supported by the decision *In re Schilling's Will, Schilling v. Schilling*, 205 Wis. 259, 75 ALR 184, 237 N.W. 122 (1931) cited in the footnote.

In her will the testatrix appointed her son-in-law, Frank Basina, as executor. The Field Solicitor's memorandum would suggest that the title to the real estate did not vest in the distributees named to receive the land sale proceeds, and with this we agree. However, it is not suggested where the title to the real estate reposed following the death of the testatrix in 1914 or even from the date of the approval of the will by the Secretarial order entered in 1923. "There is no such legal entity as an 'estate' " ⁵ capable of receiving, holding or conveying title, and the title to personal property reposes in the executor until a conveyance document such as a deed, a bill of sale, or an order of distribution is issued. (In the majority of states, the title to real property vests in the devisees at the date of death of the testator.) In this situation the Assistant Secretary's approval of the will specifically provided "no rights of an executor will be recognized." In this situation we are confronted with no other alternative than the conclusion that the title vested in the United States with the Secretary performing the functions and duties of an executor, and that such title has there reposed to this date sub-

ject to the provisions of the will as approved. However, he is in no way limited to or bound by any state statute regulating the power or authority of an executor.

The rights created in the six surviving children of the testatrix who should properly be designated as "legatees" of the personal property consisted only of the right to the distribution of the proceeds of sale when received by the Secretary (or the officer holding the delegated authority to sell and issue necessary conveyances).

It is, therefore, concluded that as a matter of law the inventories prepared in the estates of subsequently deceased legatees should not have included any apparent interest in the lands which had been directed to be sold. Distribution of personal property rights so acquired by inheritance by the heirs and legatees of the subsequently deceased legatees should have been made in accordance with the laws governing distribution of personal property. Nothing herein should be construed as a determination that the trust character of the personal property was lost.

The petitioners herein, who oppose the sale which the Superintendent proposes to make pursuant to the directives in the will and the Secretary's original order of 1923, would have us completely thwart the intent of the testatrix in the disposition of the property and its distribution. Her intent was properly honored by the Secretarial order

⁵ *Black's Law Dictionary*, Revised Fourth Edition (1968), p. 643 and cases cited.

approving the will, and if we were to follow the suggestions of the petitioners, we would act contrary to the spirit and text of 25 U.S.C. § 373 (1970) as such statute was interpreted in *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598 (1970). To act otherwise than to approve the will and carry out the directives thereof would be an arbitrary and capricious exercise of the very limited discretion vested in the Secretary by the statute as interpreted by the court.

As it appears necessary upon an analysis of the Wisconsin law governing distribution of personal property at the respective dates of death of the successors in interest, modifications of the orders of distribution should be entered in all successor estates.

Authority is hereby granted to the Administrative Law Judge to modify existing probate orders to make such proper distribution. Thereupon, when the proceeds of sale are available, they will be disbursed to those who are legally entitled thereto including the church provided it can be identified and is capable of rendering the service indicated in the will.

The petitioners' plea that we consider their individual past understandings that they owned interests in this real estate, and their contention that there were certain of them who enjoyed a communal use of the property is disposed of by the rule which we have here found to be controlling.

Those arguments made in the

Field Solicitor's brief in behalf of the Superintendent that estoppel will not operate against the United States, and that no claim in property can be acquired by adverse use or possession against the United States is recognized as also controlling in this matter.

It is likewise true that, in the absence of a statute a policy cannot be recognized as paramount over an individual's rights of sale. The procedures for sale of the land here involved by the Secretary are set forth in the regulations, and there is certainly no ban against the submission of a bid by one or more Indian people, or by the tribe itself.

Any improvements placed on the land by individual interest holders shall be considered their individual non-trust personal property subject to removal prior to sale or subject to separate sale by those entitled thereto or to abandonment in place.

It is indicated in the record that some part or portion of the interest in sale proceeds may have passed by inheritance or will to persons not of Indian blood. If patents in fee for such interests have been mistakenly issued, it will be incumbent upon the Solicitor to confer with the Department of Justice concerning the institution of the necessary court proceedings for the cancellation of such patents and the cancellation of any tax or other liens. If no patent in fee has been issued, then under the doctrine of *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Okla. 1966), it is not necessary to do other than to distribute the proceeds of sale to

March 5, 1974

those who can establish ownership of such interests.

NOW, THEREFORE, by virtue of the authority delegated by the Secretary of the Interior, 43 CFR 4.1, the petition for reopening in the estate of Mary Soulier is here DENIED; and

IT IS FURTHER ORDERED that the petition for correction of any inventory of the estate of a person who purportedly held through and under the will of Mary Soulier which includes any interests in the lands directed by her to be sold, shall be corrected by order of the Administrative Law Judge *nunc pro tunc* to eliminate such lands from such inventories, and to also correct the orders of distribution of the interests of such decedents to include a provision for the distribution of the proceeds of the sale of lands, when received, as personal property in trust; and

IT IS FURTHER ORDERED that the Administrative Law Judge shall be and he is hereby delegated such authority as may be necessary to issue such additional and further orders in related matters as may be necessary to accomplish purposes of this order in accordance with the views herein expressed.

Notice of the issuance of this decision now and of the corrective implementing orders when issued pursuant to this decision shall be mailed by the Administrative Law Judge to the respective parties in interest, to their attorneys, and to the officers of the Bureau of Indian Affairs

where appropriate. A record of such mailing shall be preserved in this and related cases.

This decision is final for the Department.

DAVID J. McKEE,
Chief Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

HARMAR COAL COMPANY

3 IBMA 32

Decided March 5, 1974

The Board has before it an appeal by Harmar Coal Company from an order of the Administrative Law Judge dismissing its petition for modification filed pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969. Subsequent to the filing of the Notice of Appeal, Harmar Coal Company and the Mining Enforcement and Safety Administration filed a joint motion for expedited appeal to which were attached joint proposed findings of fact, conclusions of law and a stipulation.

Order vacated and petition granted.

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Jurisdiction

An Administrative Law Judge does not lose jurisdiction of a proceeding for modification of the application of a mandatory safety standard where the parties enter into a stipulation of fact rendering a formal evidentiary hearing unnecessary.

APPEARANCES: Herbert J. Martin, Esq., John A. Macleod, Esq., and James T. Hemphill, Jr., Esq., in behalf of Harmar Coal Company; John P. McGeehan, Esq., in behalf of Mining Enforcement and Safety Administration.

OPINION BY THE BOARD
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Factual and Procedural
Background

On September 27, 1973, Harmar Coal Company (Harmar) filed in the Office of Hearings and Appeals a Petition for Modification of a Mandatory Safety Standard, pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969 (the Act) and 43 CFR 4.550. Harmar requested a modification of the application of section 303(f) of the Act, 30 CFR 75.305, with respect to the 14 North return airway at Harmar Mine.

The Mining Enforcement and Safety Administration (MESA) filed an answer to Harmar's petition on October 16, 1973, and stated that MESA would institute an investigation of the petition, pursuant to section 301(c) of the Act. The Administrative Law Judge (Judge) on November 16, 1973, issued a

Notice of Hearing for December 17, 1973.

The United Mine Workers of America, as the representative of the miners at Harmar Mine, was served with a copy of Harmar's petition, MESA's answer and the Notice of Hearing, but did not file an answer or otherwise comment upon the petition on or before December 13, 1973, as required by the official notice of the petition published at 38 F.R. 31318, November 13, 1973.

MESA conducted a complete investigation at the Harmar Mine on October 18, 1973 and issued a memorandum report dated November 13, 1973, recommending that Harmar's petition be granted provided that Harmar would accept and comply with the conditions stated in MESA's memorandum report. MESA thereupon filed an amended answer to the same effect on December 5, 1973, and a copy of the amended answer, with the memorandum report attached thereto was served upon the United Mine Workers of America.

The Notice of Hearing issued by the Judge on November 16, 1973 advised the parties as follows:

Prior to the hearing the parties shall confer on the prospects of the disposition of this matter without a hearing. Affirmative results of such conference shall be reported to this Judge, together with a joint motion for dismissal on the grounds of agreement achieved without the necessity of a hearing.

On December 13, 1973, Harmar filed a motion to dismiss on the ground that the parties had dis-

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posed of all issues involved and that; accordingly, a public hearing would not be necessary.¹

Thereafter, on January 8, 1974, the Judge issued a decision and order, in which he dismissed the proceeding for lack of jurisdiction on the ground that, since the parties had disposed of all issues involved and had thus eliminated the necessity for a public hearing, the Hearings Division of the Office of Hearings and Appeals had no further jurisdiction over this matter. The order also referred Harmar's petition to the Administrator, MESA, for further action.

The Administrator informed Harmar through counsel, by letter dated January 17, 1974, that MESA did not intend to take any action on its own toward granting Harmar's petition, since it is MESA's belief that, by virtue of section 301(c) of the Act and the procedural rules of the Department of the Interior, 43 CFR 4.550 it is exclusively within the province of the Office of Hearings and Appeals to issue the decision required by section 301(c) before a petition for modification can be granted.

On January 28, 1974, Harmar timely filed a Notice of Appeal from the order entered by the Judge on January 8, 1974 and asked this Board to take jurisdiction of this appeal and to grant Harmar's petition for modification of the appli-

cation of section 303(f) of the Act, 30 CFR 75.305, with respect to the 14 North return airway at Harmar Mine.

We agree with the joint position expressed by counsel for both parties to this appeal that when a petition is filed in the Office of Hearings and Appeals for the modification of the application of a safety standard to a mine, that section 301(c) of the Act and the regulations promulgated thereunder require the Judge assigned to the case to render a decision granting or denying the petition. The mere fact that the parties have stipulated as to the facts, so that an evidentiary hearing becomes unnecessary, does not deprive the Judge of the jurisdiction, nor does it absolve him of the duty, to make the decision.

Based upon the pleadings filed herein, including the stipulation of the parties, and the investigative report prepared by MESA's technical experts on mine safety, the Board makes the following findings of fact:

1. Harmar has proposed for the 14 North return airway at Harmar Mine a method of making examinations for hazardous conditions, including tests to determine air quantity and quality, as set forth in paragraphs numbered 1-31 of the attached appendix, entitled, "Stipulations of Fact."

2. MESA has approved Harmar's method of examining the 14 North return airway subject to the conditions set forth in paragraphs

¹ The record indicates, however, that a brief hearing was convened on December 17, 1973, at which time the only action taken was to continue the proceeding until January 15, 1974.

18 through 28 of the referenced stipulation of the parties.

3. Harmar has agreed to comply with each of the conditions set forth in paragraphs 18 through 28 of the stipulation of the parties.

4. The United Mine Workers of America, the representative of the miners, did not file any answer or objection to Harmar's application for a modification of the application of section 303(f) of the Act to the 14 North airway at Harmar Mine and did not appear at the hearing convened by the Judge in this proceeding on December 17, 1973.

5. The stipulation of the parties sets forth an alternative method for achieving with respect to the 14 North return airway at Harmar Mine no less than the same measure of protection afforded the miners by the standard of section 303(f) of the Act and 30 CFR 75.304.

Based upon the foregoing findings of fact, the Board concludes that:

1. The alternative method proposed by Harmar Coal Company will guarantee no less than the same measure of protection afforded the miners under the mandatory standard set forth in section 303(f) of the Act, 30 CFR 75.305.

2. Harmar Coal Company is entitled to modification of the application of section 303(f) of the Act, 30 CFR 75.305, with respect to the 14 North return airway at Harmar Mine, conditioned upon compliance with paragraphs 18 through 28 of the stipulation of the parties dated February 22, 1974, a copy thereof

being attached hereto as an Appendix.

3. The Hearings Division of the Office of Hearings and Appeals does not lose jurisdiction over a section 301(c) proceeding when the parties are in agreement with respect to the terms and conditions of a proposed modification of the application of a mandatory health or safety standard to a particular mine.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. The joint Motion for Expedited Appeal BE AND HEREBY IS GRANTED;

2. The Judge's order of January 5, 1974, dismissing the proceeding BE AND HEREBY IS VACATED;

3. Harmar Coal Company's petition for modification of the application of the mandatory safety standard of section 303(f) of the Act and 30 CFR 75.305 with respect to the 14 North return airway at Harmar Mine IS GRANTED conditioned upon compliance with the terms and conditions of paragraphs 18 through 28 of the stipulation of the parties appended hereto and made a part hereof;

4. This decision is effective immediately, except that Harmar Coal Company will have a period of thirty (30) days from the date hereof to comply with each of the conditions hereinabove set forth,

March 5, 1974

which period of time may be extended by MESA if, in its judgment, circumstances warrant such extension;

5. A copy of this decision shall be served immediately upon the representative of miners at the Harmar Mine by a representative of MESA, pursuant to the provisions of section 301(c) of the Act;

6. Pursuant to the provisions of section 107(a) of the Act, the Harmar Coal Company shall immediately post a copy of this decision on the Harmar Mine bulletin board; and

7. Pursuant to the provisions of section 107(b) of the Act, MESA shall immediately mail a copy of this decision to the official of the Commonwealth of Pennsylvania charged with the responsibility for administering that State's coal mine health and safety laws.

C. E. ROGERS, Jr.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR BOARD OF MINE OPERATIONS APPEALS OFFICE OF HEARINGS AND APPEALS

IN RE: APPEAL OF HARMAR COAL COMPANY, HARMAR MINE, 301(c) PETITION FOR MODIFICATION OF MANDATORY SAFETY STANDARD OF SECTION 303(f), 30 CFR § 75.305 DOCKET No. M 74-25, PETITIONER.

STIPULATIONS OF FACT

1. The Harmar Mine is located in Allegheny County, Pennsylvania. Openings into the mine consist of five shafts and two slopes into the double Freeport coalbed.

2. Harmar Mine at present has four active coal-producing sections, three of which (18 south, 34 south, and 6 west) are totally dependent upon the Campbell shaft and the 14 North airways which serve as the return air course in a split system of ventilation from these working sections.

3. The return air course from the junction of 14 North and 4 Mains to the base of Campbell shaft was developed during the period from 1926 to 1932, prior to the use of roof bolts as a technique for roof control, and timbers were used as part of the mining cycle to provide roof support.

4. The entries leading to Campbell shaft were maintained until 1951 when the intake side of the shaft was sealed off and all track in the area was abandoned. Since that time, the 14 North entries have been used only as a return air course.

5. The 14 North airway from the junction of 14 North and 4 Mains to the Campbell shaft is approximately 1,090 feet in length. Since this area is also the lowest point in the mine, it inevitably acts as a drainage basin.

6. A deep well pump in the 14 North entries leading to Campbell shaft is situated immediately adjacent to the shaft and can dispose of 1,750 gallons of water per minute (or a total of 1,836,000 gallons per day). This pump is equipped with a float mechanism and normally operates 18 hours per day in four cycles, with one to one-and-one half hour breaks between each cycle.

7. A visible and audible signal in the lamp house on the surface is triggered at the beginning and end of each pumping cycle.

8. Safe travel is obstructed along the entire 14 North airway from the junction

of 14 North and 4 Mains to the Campbell shaft by the presence of water throughout the 14 North entries, varying in depth from zero to hip deep, and yellow boy and muck, varying in depth from zero to three feet.

9. Water in this area has contributed to the deterioration of the roof, ribs and remaining timbers, with the result that high, tight roof falls and unsupported, overhanging roof have rendered the area unsafe for travel.

10. Restoration of the 14 North airway would require approximately 1,500 man days of work under extremely hazardous conditions.

11. No escapeways travel through the 14 North airway.

12. Approximately half of the return air reaching the Campbell shaft fan comes from active working sections (18 South, 34 South and 6 West); the other half comes from bleeder entries along the 4 Mains motor road.

13. Two air measuring stations have been established underground on either side of the 4 Mains motor road, which is perpendicular to the seven entries comprising the 14 North airway. One of these stations measures the air returning to the Campbell shaft fan from the active working sections; the other measures the air returning from accessible bleeder entries along the 4 Mains motor road.

14. A third air measuring station has been established on the surface at the Campbell shaft fan in order to measure the total quantity of air reaching the fan, including that from inaccessible bleeder entries.

15. On October 18, 1973, an investigation was conducted at the Harmar Mine by George Svilar, MESA Coal Mine Staff Specialist, and Eugene T. Ruttle, MESA Mining Engineer, for the purpose of examining the 14 North airway and testing the quantity and quality of air throughout the 14 North airway and at each of the three proposed air measuring stations.

16. The results of this investigation are recorded in a memorandum report dated

November 13, 1973, addressed to John W. Crawford, Acting Assistant Administrator—Coal Mine Health and Safety, through Robert E. Barrett, District Manager—Coal Mine Health and Safety District 2. This report, signed by George Svilar and Eugene T. Ruttle and approved by John W. Crawford, is fully incorporated herein by reference, including the attachment thereto which is captioned, "Table 1—Analysis of Air Samples Collected, October 18, 1973."

17. The report of the investigation by MESA concludes that no diminution (sic) of safety will result from the implementation of Harmar's proposed modification of standard, provided that Harmar complies with the recommendations stated on pages two and three of the report, which recommendations are set forth in paragraphs 18 through 28 below.

18. Roof bolts shall be installed in the area of the underground proposed air measuring stations, and the stations, at all times, shall be maintained in a safe condition.

19. The quality and quantity and direction of flow of the air and the methane concentration shall be determined at the proposed air measuring stations by a certified person on a daily basis.

20. The date, time, initials of the examiner, and results of these determinations shall be recorded in a book, or on a date board, that shall be provided at each measuring station. Such results shall also be recorded in a book kept on the surface and made accessible to interested persons.

21. Methane gas shall not be permitted to accumulate in these airways in excess of the legal limits.

22. If, at any time, the air quantity at any of the measuring stations should indicate a reduction of air quantity of 10 percent, an immediate investigation of the affected area will be conducted.

23. No persons will enter the 14 North airways until a plan outlining the procedure to be followed is submitted to and approved by the District Manager.

24. The quantity of air at the Campbell shaft will be determined with fan static

pressure and the fan curve provided by the manufacturer of the fan.

25. The methane will be measured from the outside of the fan through a sampling tube.

26. In addition to the visible signal, an audible signal shall be installed in the lamp house for the purpose of notifying the attendant when the deep well pumps at Campbell shaft start and stop. These starts and stops shall be recorded in a book maintained for that purpose in the lamp house.

27. If at any time, one pumping cycle of the deep well pumps at Campbell shaft indicates an increase of one hour or more pumping time, the pump starting time shall be adjusted to start the pump more often, in direct proportion to the increase in pumping time. Such increase in pump starts shall remain in effect until two pumping cycles indicate the adjustment can be reversed.

28. Since the Strohm shaft fan and the airways of this fan are necessary to provide the required escapeways, no alterations of the fan or airways to the Strohm fan will be made until such changes are submitted to and approved by the District Manager.

29. Harmar Coal Company accepts in full the conditions set forth in paragraphs 18 through 28 above and will comply with such conditions as long as this agreement remains in effect.

30. This agreement applies only to the Harmar Mine of Harmar Coal Company and shall continue in effect until such time as the management of Harmar Mine determined in its discretion that it shall no longer operate in whole or in part in accordance with the terms of this Stipulation and Modification Order and that it will instead operate in accordance with the terms of Section 303(f) of the Act and the implementing regulations. In the event that the management of Harmar Mine makes such a determination, a thirty-day prior written notice shall be given to the Mining Enforcement and Safety Administration.

31. The United Mine Workers of America did not appear at the hearing convened by the Administrative Law Judge in this proceeding on December 17, 1973 and has at no time filed any objection to this petition for modification.

Date: 2/22/74

(S) Herbert J. Martin,
Attorney for Harmar Coal Company.

(S) John P. McGeehan,
*Attorney for Mining Enforcement
and Safety Administration.*

BUFFALO MINING COMPANY

3 IBMA 45 Decided March 6, 1974

Appeal by Buffalo Mining Company (Buffalo) from a decision dated May 7, 1973 (Docket No. HOPE 72-173-P), by Administrative Law Judge Edmund M. Sweeney, assessing a civil monetary penalty of \$650 for five violations of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed in Part—Vacated in Part.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Sufficiency of Evidence

A Notice of Violation setting forth an alleged violation of the respirable dust standards, standing alone, will not support such a violation.

APPEARANCES: Wesley C. March, Esq., Attorney for appellant, Buffalo Mining Company; Robert A. Long, Associate Solicitor, J. Philip Smith,

¹ 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

Assistant Solicitor, and Mark M. Pierce, Trial Attorney for Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Discussion

This appeal is limited to two alleged violations of section 202(b) (1) of the Federal Coal Mine Health and Safety Act of 1969 (Act), and 30 CFR 70.100.

To establish these alleged violations of the respirable dust standards, the Mining Enforcement and Safety Administration (MESA) relied solely upon two written Notices of Violation. The inspectors who issued and signed these Notices did not appear or testify during the hearing. Each of the Notices indicates that on the date and in the section of the mine involved, the cumulative concentration of respirable dust from the samples analyzed in each case exceeded the regulatory limit of 30 milligrams per cubic meter of air. In addition, MESA introduced extensive expert testimony as to the requirements of the Act and regulations with respect to the control of respirable dust within a mine and the application of the rules and regulations promulgated by the Secretary to implement and enforce this section of the Act.

During the course of the proceedings below, and on this appeal, Buf-

falo launched a vigorous attack upon the validity of the aforesaid rules and regulations issued by the Secretary. As to this thrust, we find, as did the Administrative Law Judge, that such attack upon the validity of the rules lies outside the scope of the Board's delegated adjudicatory functions. (*Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, CCH Employment Safety and Health Guide par. 16,618 (1973).) Therefore, we reject Buffalo's argument insofar as it deals with validity of the rules.

We have previously held that a Notice of Non-Compliance (computer printout) will support a Notice of Violation of section 202 of the Act (*Castle Valley Mining Co.*, 3 IBMA 10, 81 I.D. 34, CCH Employment Safety and Health Guide par. 17,233 (1974)). However, in reviewing the record in this case, we note that no specific reference was made to the Notices of Non-Compliance as being computer printouts, nor were they introduced as such in evidence. Consequently, we are unable to extend our holding in *Castle Valley*, *supra*, to the case here presented. Accordingly, we hold that a Notice of Violation citing noncompliance with the respirable dust standards standing alone is not sufficient to establish a *prima facie* case of such a violation. We do not intend, and are not here holding, that a violation of the respirable dust standards can only be substantiated by a computer printout Notice of Non-Compliance. There may, of course, be other

methods of proof, and we are not unmindful of our statement in *Armco Steel Corporation*, 2 IBMA 359, 80 I.D. 790, CCH Employment Safety and Health Guide par. 17,043 (1973) as follows:

We emphasize that the Board is not holding that a notice of violation may never constitute a prima facie case. Indeed, we are of the view that a sufficiently specific notice of violation, with proper foundation, standing by itself, may constitute a prima facie case in some instances.

With the foregoing in mind, we have re-examined the Notices of Violation of respirable dust standards issued in this case and have determined that the information contained therein, standing alone, is not sufficient to meet MESA's burden of proof in a section 109 penalty proceeding. We think that, at least, MESA should have identified and introduced into evidence the original computer printouts showing noncompliance to support the alleged violations and which, presumably, were supplied to the operator.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED except that Notice No. 1 TWG, February 11, 1971, and Notice No. 1 HB, March 17, 1971, ARE VACATED and the associated assessments in the total amount of \$100 ARE SET ASIDE.

IT IS FURTHER ORDERED that Buffalo Mining Company pay the penalties assessed in the total amount of \$550 on or before 30 days from the date of this decision.

C. E. ROGERS, Jr.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

DONALD E. MILLER

15 IBLA 95

Decided March 11, 1974

Appeal from decision of Bureau of Land Management rejecting application S 2456 for Indian allotment for national forest land.

Affirmed.

Act of June 25, 1910—Indian Allotments on Public Domain: Lands Subject to

With respect to an Indian allotment application on natural forest land, this Department is constrained by the Act of June 25, 1910, 25 U.S.C. § 337 (1970), to accept the finding of the Department of Agriculture that the lands applied for are not more valuable for agricultural or grazing purposes than for the timber found thereon. Such a finding dictates rejection of the application by this Department.

APPEARANCES: George Forman, Esq., California Indian Legal Services, Berkeley, California, for appellant; David K. Grayson, Esq., Office of the

Solicitor, U.S. Department of the Interior, Washington, D.C. for appellee Bureau.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Donald E. Miller has appealed from a decision of the Bureau of Land Management of September 27, 1973, which rejected his application, S 2456, for an Indian allotment in the Six Rivers National Forest, Humboldt County, California. Appellant's application was filed February 17, 1969, and included that part of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 9, T. 11 N., R. 6 E., H.M., California, lying west of the Klamath River. His application was filed pursuant to section 4 of the General Allotment Act, 25 U.S.C. § 334 (1970), and section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970), and in it he sought a parcel of some 25 acres.

By a decision entitled *Donald E. Miller*, 2 IBLA 309 (1971), this Board affirmed, with modification, a decision of the Bureau of Land Management which affirmed the rejection of appellant's Indian allotment application. In that decision, rendered while a suit was pending, *Miller v. United States*, Civil No. 70-2328 (N.D. Cal., 1973), we found that this land was not subject to settlement and disposal due to withdrawals for powersite purposes. Subsequently, the District Court ruled that the issue of the effect of these powersite with-

drawals on the subject lands should not be settled until the Department of Agriculture had made a recommendation based on the correct statutory standards for disposal of these lands. *Id* at 5.

Section 31 of the Act, *supra*, provides for the discretionary allotment by the Secretary of the Interior of those lands within the national forests which the Secretary of Agriculture has determined "are more valuable for agriculture or grazing purposes than for timber found thereon * * *." The District Court found that the Department of Agriculture erroneously determined the land to be more valuable for "national forest purposes" than for "agricultural settlement or grazing." The Court emphasized that section 1 of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1970), under the rubric of "national forest purposes," includes considerations that go beyond the scope of the test required under 25 U.S.C. § 337.¹ This being so, appellant's application was remanded to the Department of the Interior for referral to the Department of Agriculture for application of the correct test.

The decision appealed from at present notes that upon referral, the Forest Service, U.S. Department of Agriculture, reported that the land applied for "is not more

¹ "As set forth in 16 U.S.C. § 528, * * * national forest purposes include, not only timber purposes, but also outdoor recreation, range, watershed, wildlife and fish purposes—considerations that go beyond the scope of the test required under 25 U.S.C. § 337, i.e., the timber." *Miller v. United States*, *supra* at 4.

valuable for agriculture or grazing purposes than for timber found thereon." The Bureau's decision states that

* * * this finding is supported in the report, and in the earlier Forest Service report of July 30, 1969, and must be accepted by the Department of the Interior. [25] U.S.C. § 337 (1970). This alone is sufficient reason for rejecting the application.

In appealing from the Bureau's decision, appellant argues that the Bureau did not use proper criteria in denying his application and that the evidence presented in the Forest Service report does not support the Bureau's decision when the proper criterion of "substantial evidence" is used. In answer, the Bureau maintains that it properly relied on the report by the Forest Service, and that the conclusions arrived at therein were based on substantial evidence.

The District Court's decision directed the Department of the Interior to "* * * make a new determination whether plaintiffs' application should or should not be granted * * *." *Miller v. United States*, *supra* at 6. The Secretary of Agriculture thereafter "determined that the land is not more valuable for agriculture or grazing purposes than for the timber found thereon." The Act of June 25, 1910, 25 U.S.C. § 337 (1970), clearly vests the determinations as to comparative values in the Secretary of Agriculture.

As we stated in *Junior Walter Daugherty*, 7 IBLA 291, 294-95 (1972), we are bound by the deter-

mination of the Secretary of Agriculture and are accordingly constrained to follow it.² Even if we had the authority to find that this parcel was "more valuable for agricultural or grazing purposes than for the timber found thereon," we advert to our earlier decision, *Donald E. Miller*, 2 IBLA 309 (1971). This indicates that an Indian allotment is not allowable because an applicant is required to occupy the land when it is open to occupancy. Here the record indicates such occupancy commenced while the land was withdrawn for powersite purposes.

In any event, even where occupancy is properly initiated, and the Secretary of Agriculture makes a favorable determination, the Secretary of the Interior may reject the allotment on any rational basis including, without limitation, considerations of public policy. *Curtis D. Peters*, 13 IBLA 4, 80 I.D. 595 (1973). We find that disposal of the land in issue would have negative environmental consequences and no apparent countervailing favorable aspects. We find that such land has high recreational potential and that the public interest would be promoted by retention of the land in federal ownership. For that reason

² This is not to suggest that the Board could not ask the Department of Agriculture to reconsider a conclusory finding unsupported by data. However, in the case at bar, because of the unlawful occupancy, no useful purpose would appear to be served thereby. Of course, appellant is at liberty to endeavor to have the Forest Service of the Department of Agriculture reconsider its finding.

also we affirm the rejection of the application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

ANNE POINDEXTER LEWIS,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEAL OF ELECTRICAL ENTERPRISES, INC.

IBCA-971-8-72

Decided *March 19, 1974*

Contract No. 14-03-79886, Bonneville Power Administration.

Sustained in Part.

Contacts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Suspension of Work

Where a contract for the construction of two power lines provided that the Government had placed a center hub at each tower location but that the contractor was to check stationing, alignment and elevation of each center hub and to replace missing or destroyed center hubs, the Board rejected the contractor's con-

tention that the fact some of the hubs were missing made the specifications defective since the contract contemplated that some of the hubs might be missing. Although the contractor failed to give the notice required by paragraph (b) of the Changes clause or paragraph (c) of the Suspension of Work clause, the Board, under the circumstances present here, considered the claim for a constructive change or suspension of work while the Government replaced the missing hubs on the merits, holding that the contractor's failure to assert the claim at an earlier time was a factor to be considered in determining whether the contractor had satisfied its burden of proof.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Notices

Where a road was not in the location specified by the drawings and the Government relocated two of the towers in order to avoid difficulties and expenses associated with having the legs of one of the towers located on the slope of a cut through which the road had been constructed, the Board holds that the specifications were defective and that the contractor was entitled to an equitable adjustment for all costs incurred in attempting to perform under such specifications in accordance with the Changes clause. Claims involving defective specifications are recognized exceptions from the notice requirements of the Changes clause and need only be asserted within a reasonable time and before final payment.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Suspension of Work

Where the Government ordered a delay in work pending a determination as to methods to be used in stringing conductor for power lines and a further delay pending receipt of bolts of the length specified by the drawings for tower assembly, the contractor was entitled to an adjustment for the resulting costs in accordance with the Suspension of Work clause. The evidence showed that the delay regarding bolts, which were to be furnished as GFP, was only one-half day but was due to the fact the drawings specified bolts of an incorrect length. The specifications were thus defective and it is well settled that any delay due to defective specifications is unreasonable.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Acceleration—Contracts: Performance or Default: Excusable Delays

A contractor's claim for an equitable adjustment for costs incurred in allegedly accelerating performance of the work was denied where appellant failed to establish that the costs claimed resulted from the denial of proper requests for time extensions, rather than from a belated attempt to overcome the effects of inclement weather, insufficient and inadequate equipment, etc., for which the Government was not responsible.

APPEARANCES: Patrick A. Sullivan, Attorney at Law, Winston, Cashatt, Repsold, McNichols, Connelly & Driscoll, Spokane, Washington, for appellant; David E. Lofgren, Departmental Counsel, Portland, Oregon for the Government.

OPINION BY ADMINISTRATIVE JUDGE NISSEN

INTERIOR BOARD OF CONTRACT APPEALS

This appeal involves claims for additional compensation due to alleged changes and suspension of the work. The parties have stipulated that the Board decide only the issue of liability.¹ Appellant also seeks to be relieved of liquidated damages totaling \$14,500.

Findings of Fact

The contract,² awarded on November 25, 1968, is in the estimated amount of \$107,794.50 and calls for the construction of the Lower Monumental Powerhouse—Substation 500 KV Line No. 1 and the Lower Monumental Powerhouse—Substation 13.8 KV Service Line. The contract called for the work, with the exception of necessary cleanup, to be completed not later than April 1, 1969. The completion date was premised on the Notice to Proceed being issued not later than December 10, 1968. The Notice to Proceed was issued and accepted by appellant as of December 9, 1968.

The contract includes Standard Form 23-A (June 1964 Edition) as amended by the 1968 revision of the "Changes" and "Differing Site Con-

¹ Tr. 6. However, guidance was requested as to whether extended overhead, such as idled equipment and the superintendent's time, was an allowable cost, if liability was found.

² Appeal file, Item 1.

ditions" clauses and clause 23, "Suspension of Work."³

The 500 KV line, also referred to as the DB line, was approximately one mile in length and required, *inter alia*, the erection of three steel towers, the largest of which was over 300 feet in height (Tr. 113, 140). The purpose of the line was to provide power from the powerhouse of the Lower Monumental Dam, which was then under construction.

³ 23. SUSPENSION OF WORK.

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or

(2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

The line crossed the Snake River. The Service Line, also known as the DV line, was approximately 7/10 of a mile in length and when completed, consisted in part of nine towers approximately 80 feet in height (Tr. 48). Among other items, tower steel, conductors and cables were to be furnished by the Government.

The completion date of the contract was extended to April 14, 1969, because of unusually severe weather, for ten days during the period December 24, 1968, to January 5, 1969, and three days for the period January 21 to 31, 1969 (Change Orders B & C, dated January 30 and February 27, 1969, respectively). The project was accepted as substantially complete on May 13, 1969, a delay of 29 days, resulting in an assessment of \$14,500 in liquidated damages at the contract rate of \$500 per calendar day (Disbursement Voucher, dated September 28, 1970, Item 2).

Appellant submitted its formal claim for additional compensation in the amount of \$48,058.73 and its request to be relieved of liquidated damages under date of April 28, 1972 (Item 5). In a Findings and Decision, dated August 9, 1972, the contracting officer denied the claims in their entirety (Item 4). He found that final payment under the contract was made on September 28, 1970, and that none of the present claims were filed until April 28, 1972, 19 months after final payment.

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He further found that the contractor failed to give notice of the claims within the time required by the "Changes" and "Suspension of Work" clauses or before final payment.⁴ The contracting officer commented on the merits of the claims, finding them to be without merit, but stated that such comments were without prejudice to his position as to notice and final payment. To the extent that issues of timely notice remain in the case, they will be decided in connection with the individual claims.

Missing Tower Hubs

The contract states that the Government has placed a center hub marked with line stationing and elevation at each tower location.⁵

⁴ By an order, dated February 14, 1973, we denied, without prejudice to renewal of the motion after the record was closed, the Government's motion to dismiss the appeal based on lack of timely notice and the contention that final payment had been made before the claims were filed.

⁵ The specifications provide in pertinent part:

1.107. MODIFICATION OF SECTION 3-105. Paragraphs A., and B., Section 3-105, LINES AND GRADES, are changed to:

A. *General.* The contractor shall be responsible for the preservation of all existing stakes, hubs and bench marks until their removal is authorized by the contracting officer, and he shall re-establish, without cost to the Government, any which are displaced by him. The contractor shall be responsible for the proper execution of the work to the lines and grades shown on the drawings and established in the field by the contracting officer and shall promptly report any errors or omissions found in the drawings or staking.

B. *Transmission Line Construction.* 1. The Government has placed a center hub marked with line stationing and elevation at each tower location. The contractor shall check the stationing, alignment, and elevation of each center hub and shall make necessary corrections to line and grade. Missing or

The Daily Progress Report for December 11, 1968 (App.'s Exh. A), includes the following: "The Tower Center (sic) hubs seem to be all gone on the L. Mon. Power House [500 KV] line." The center hub stake for tower 1/3 on the 500 KV line was subsequently located (Daily Progress Report dated December 12, 1968, App.'s Exh. A). Mr. Sargent, President of appellant, observed that some of the hub stakes were missing at the time of his prebid site inspection (Tr. 137, 138). He asserted that two of the hub stakes for the 500 KV line and about six hub stakes for the service line were missing.⁶ He, nevertheless, expected that the stakes would be there when he arrived on the job

destroyed center hubs and bench marks shall be re-established by the contractor from existing reference points or by re-running the center line from existing hubs. Site data sheets and an abstract of bench marks, angle points, and points on tangent, giving station, description, and elevation, will be furnished the contractor. Stakes, and hubs, shall be furnished by the contractor. The quality shall be such that all markings will be legible.

* * * * *

8. Payment will be made at the unit contract price and shall be full compensation for all costs involved in making measurements, staking, recording field notes, and furnishing field notes for a foundation. Adjustments in measurements and staking, including re-marking of stakes, for a change in footing type will not be paid for. Stakes, hubs, and bench marks that are missing through no fault of the contractor shall be replaced by him and will be paid for as provided in EXTRA WORK.

⁶ Tr. 138, 139. Although there is a report of an allegation by the subcontractor, Kirkland, that the tower hub for tower 1/2 of the service line was missing at the time (unspecified) of his site inspection (Daily Progress Report, dated December 19, 1968), the record does not support the assertion that center hubs were missing on the service line.

after the award was made. (Tr. 182.)

Appellant subcontracted excavation and installation of footings on the towers to Kirkland Construction Company (Tr. 111, 138, 139). A staking crew employed by the subcontractor to stake the foundations for the towers arrived on the job on December 10, 1968 (Inspector's Weekly Digest, dated December 12, 1968, Item 45). Mr. Sargent testified that he was notified by the subcontractor, Kirkland, that some of the hub stakes were missing (Tr. 140). He told Kirkland not to move any machinery onto the job until the tower lines were properly staked (Tr. 140, 141). However, the record reflects that a backhoe for the purpose of excavating for the footings on the towers was delivered to the job on December 12, and equipment on the job on December 13, 1968, included two small backhoes and two small cats (Daily Progress Reports for December 12 and 13, 1968).

BPA sent in a survey crew which arrived at the site on December 13, 1968, and completed the task of replacing the missing hubs on Saturday, December 14, 1968 (Tr. 54, 56; Daily Progress Report, dated December 16, 1968). The subcontractor completed staking tower foundations for the service line, including tower 1/3 on the 500 KV line, on December 12, 1968. Staking of tower foundations for the remaining towers on the 500 KV line was completed on the afternoon of December 16, 1968.

Appellant had planned to com-

plete erection of the towers for the 500 KV line first (Tr. 112, 130, 139; Proposed Progress Schedule, Supplemental File, Item 1). Mr. Sargent testified that they had planned to start excavation for the larger footings on the 500 KV line with the backhoe on the job and complete excavation with a larger machine (Tr. 140, 141). He disputed assertions that the backhoe on the job was a "garden tractor," describing it as a 580 Case with a 15 foot "Extendoe" attachment and a $\frac{3}{8}$ yard bucket. A large backhoe for the purpose of excavating footings for the towers on the 500 KV line arrived on the job on December 19, 1968.⁷ Mr. Sargent asserted that the delay in moving this machine to the job was due to his instructions to Kirkland previously mentioned (Tr. 141, 142). Excavation for footings on the service line (Tower 1/9)⁸ commenced on December 16 and excavation for footings on the 500 KV line commenced on December 20, 1968 (Daily Progress Reports).

⁷ The Daily Progress Report for December 19, 1968, refers to a big crane being moved in to excavate the footings for the 500 KV line. At the hearing (Tr. 56, 59, 100) and in subsequent reports, *e.g.*, December 20, 1968, and January 20, 1969, this machine is referred to as a backhoe. The former report indicates that the machine was experiencing cable trouble and a subsequent report describes the machine as a 30-ton shovel (Daily Progress Report for December 24, 1968, App's Exh. A-1). However, the Weekly Digest for the week ending December 20, 1968 (Item 45), indicates that a larger backhoe was brought to the job and we conclude the machine was a backhoe.

⁸ On brief, appellant asserts that excavation commenced at tower 1/9 on the service line because of an interference with an existing 13,000-volt line at Tower 1/1. As we find *infra* (note 18), this line intersected Tower 1/1 on the 500 KV line.

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Based upon the foregoing facts, appellant claims entitlement to a five day extension of performance time as well as standby costs⁹ and costs attributable to a change in the work sequence.

Decision

The Government argues that this claim appears cognizable only as a suspension of work and that since the claim is based on a constructive suspension, it is barred by the failure to give the written notice required by the Suspension of Work clause.

Appellant points out that the contract provides that a center hub has been placed at each tower location and that it is undisputed that some of the hubs were missing (Supplemental Brief Relating to

Question of Notice, dated October 4, 1973). Alternatively, appellant contends that the site was not as represented by the contract. Appellant therefore argues that the specifications are defective, that the claim is within the purview of the Changes clause and that the notice requirements of the Changes clause are not applicable to claims based on defective specifications.

The contract (Section 3-105, *supra*) does state that the Government has placed a center hub at each tower location. Paragraph B of the cited section requires the contractor to check the stationing, alignment and elevation of each center hub and to, *inter alia*, replace missing or destroyed center hubs. Accordingly, the contract contemplated that some of the hubs might be missing and we do not think that the specifications can be considered defective in this respect in any accepted sense of the term.¹⁰ We therefore conclude that the replacement of the missing tower hubs did not involve a change to the contract and that this claim is more properly cognizable under the Suspension of Work clause.

⁹ The original claim included field overhead for 16 days (including five days for missing hubs) in the amount of \$8,856.96 computed upon the rental rates of equipment allegedly idled for that period. It does not appear that this sum includes equipment owned or leased by the subcontractor, Kirkland. The claim also includes the amount of \$316 based on the superintendent's time at \$6.82 per hour plus 16 percent overhead for five days. In commenting on the claim, the contracting officer stated that the superintendent undoubtedly had other duties and that such a charge, representing administrative overhead, would not be proper in a suspension of work claim; hence, the request for guidance (note 1, *supra*). The contracting officer would clearly be correct if the superintendent was in fact otherwise engaged. However, the contracting officer's position is apparently based in part on the theory that an adjustment for suspension of work is governed by section 2.115 entitled "Extra Work." Since this clause refers only to the Changes clause, the contention that it also limits an adjustment under the Suspension of Work clause is questionable. Cf. *Frank Briscoe Co., Inc., et al.*, GSBGA No. 3456 (July 13, 1973), 73-2 BCA par. 10,162.

¹⁰ Cf. *Desonia Construction Company, Inc.*, Eng BCA Nos. 3231, *et al.* (November 17, 1972), 73-1 BCA par. 9797, wherein, *inter alia*, a gas line encountered at a higher elevation than shown on contract drawings, resulted in a holding the specifications were defective. See also *Joseph D. Bonness, Inc. et al.*, ASBCA No. 18828 (December 27, 1973), 74-1 BCA par. 10,419 (specification obligating contractor to check drawings and notify contracting officer of discrepancies did not obligate contractor to perform engineering effort in order to obtain data necessary for correction).

The question of timely notice of the claim remains. Appellant, citing *Hoel-Steffen Construction Company v. United States*¹¹ asserts that whether the claim is within the purview of the Changes or Suspension of Work clauses, it is enough that the Government be aware of the operative facts upon which the claim is based¹² or that it either knew or should have known that it was called upon to act. The Government argues that *Hoel-Steffen, supra*, is distinguishable since in that case the Court relied upon two letters as constituting the requisite notice and also upon the fact that the delay upon which the claim was based was referred to in a change order. Although there is language in the Court's opinion which supports appellant's position, we conclude that the distinction asserted by the Government has merit.¹³ In *Desonia Construction Company, Inc.* (note 10, *supra*), the Board held that mere mention in a contractor's daily report of certain work, which was not required by the contract, did not constitute the notice required by paragraph (b) of the Changes clause.¹⁴ It would seem

to follow that a report written by a Government inspector would not constitute the required notice.

Even if, as appellant asserts, however, notice of the operative facts upon which the claim is based is all that is required, it is at least doubtful that this requirement has been met. In *Davis Decorating Service* (note 12, *supra*), the evidence established that appellant had made repeated oral protests to the inspector as the work progressed that it was being required to perform extra work and that the inspector reported this fact to the base engineer. Here the record is silent as to any allegation or indication that appellant at the time considered that it was delayed or forced to change its planned work sequence because of the missing hubs. Apart from the doubts this casts on the merits of the claim, we conclude that this omission is particularly significant here in that BPA could reasonably conclude that its action in replacing the missing hubs had forestalled any claim. This is so because paragraph B.8 of Section 3-105 provides in part that hubs and stakes that are missing through no fault of the con-

¹¹ 197 Ct. Cl. 561 (1972).

¹² Support for this position can be found in *Davis Decorating Service*, ASBCA No. 17342 (June 13, 1973), 73-2 BCA par. 10,107, wherein the Board relied in part on *Hoel-Steffen* (note 11, *supra*), in holding that strict compliance with notice requirements was not required where the Government either knew or should have known the facts upon which the claim was based.

¹³ We note that the provision barring the recovery of costs incurred more than 20 days prior to giving the required notice has been strictly enforced prior as well as subsequent to the decision in *Hoel-Steffen*. See *Merando Inc.*, GSBGA No. 3300 (May 27, 1971), 71-1 BCA par. 8892; *Fred McGilvray, Inc.*, ASBCA

Nos. 15741, 15778 (September 23, 1971), 71-2 BCA par. 9113; *Edgar M. Williams, General Contractor*, ASBCA Nos. 16058, et al. (October 16, 1972), 72-2 BCA par. 9734; *Desonia Construction Company, Inc.* (note 10, *supra*) and *Cameo Bronze, Inc.*, GSBGA Nos. 3646, 3656 (June 27, 1973), 73-2 BCA par. 10,135.

¹⁴ See also *Lane-Verdugo*, ASBCA Nos. 16327 and 16328 (September 20, 1973), 73-2 BCA par. 10,271 (mere notice in critical path networks and accompanying correspondence of delays with no indication Government was responsible or that contractor expected to receive additional compensation held not to be compliance with notice requirements of 1961 version of Suspension of Work Clause).

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tractor shall be replaced by him and paid for as provided in the clause "Extra Work." It is clear that these hubs were missing through no fault of appellant.¹⁵

We conclude that although the claim could well be barred by appellant's failure to comply with the 20-day notice requirement, it is unnecessary to decide the claim on this ground because we find, in any event, that appellant has failed to carry its burden of proof on the merits.

It is immediately apparent that in claiming a five day delay, appellant has made no allowance for the time required to stake the tower foundations. The subcontractor's employees started staking tower foundations on December 10 and completed staking foundations, including those for Tower 1/3 on the 500 KV line, on December 12, 1968. After BPA replaced the missing hubs, staking of tower foundations was completed on the afternoon of December 16, 1968. Accordingly, allowing for possible delays by the staking crew in attempting to locate missing hubs (of which there is no evidence), a minimum of two days was required to stake tower foundations even if the hubs had been in place. The claim makes no allowance for this time.

Assuming that there were legitimate reasons for not commencing excavation of any tower founda-

tions on each line until all tower foundations for that line had been staked, the delay until December 16, in commencing excavation on the service line is not explained. Crucial to the validity of the claim is acceptance of Mr. Sargent's testimony that appellant (actually the subcontractor) planned to commence excavation of tower foundations for the 500 KV line with a backhoe and then finish with a larger backhoe.¹⁶ We doubt this because although the record reveals there were two backhoes on the job on December 13, 1968, there is no evidence that excavation of footings for towers on the 500 KV line commenced until December 20, 1968, which was after arrival on the job of the large backhoe. Appellant attributes the delay in delivery of this backhoe to Mr. Sargent's instructions to Kirkland that he was not to bring any equipment on the job until the tower lines were properly staked and asserts that standby costs were thereby mitigated. As we have indicated (note 9, *supra*), it does not appear that the claim includes standby costs of any equipment owned or rented by the subcontractor.

We are impressed by the fact, as our findings *infra* demonstrate, that this contractor well knew the proce-

¹⁵ The contracting officer found that the hubs were destroyed when the contractor for the Lower Monumental Dam graded the area. (Findings and Decision, p. 8.)

¹⁶ The extent of excavation actually accomplished by the "big backhoe" on footings for the larger towers is not clear. The Daily Progress Report for January 20, 1969, states that the "large backhoe" was moved off the job but indicates that excavation was not completed. Since the footings involved are stated to be 15' x 15', we conclude the reference is to the 500 KV line. See also Weekly Digest for week ending January 22, 1969.

ture for, and was not adverse to, asserting claims for delays and extra work. Under these circumstances, the absence of even a hint of delay or disruption due to the missing hubs must be accorded significance.¹⁷ The claim is denied.

Tower Relocation

This claim arises out of the relocation of Towers 1/1 and 1/2 on the service line.¹⁸ The relocation came about because a road used by the contractor constructing the dam was not in the location specified by the drawings (Tr. 142-144). This resulted in two of the legs of Tower 1/2 being located on the slope of a cut through which the road had been constructed.¹⁹ Mr. Sargent estimated

¹⁷ It is well settled that prolonged and unexplained delay in asserting a claim may create doubts as to its validity and increases the contractor's burden of proof. See *John H. Moon & Sons*, IBCA-815-12-69 (July 31, 1972), 80 I.D. 465, 72-2 BCA par. 9601 and *Husman Brothers, Inc.*, DOT CAB No. 71-15 (January 15, 1973), 73-1 BCA par. 9889. See also *Bay Construction Inc., and Don L. Conney, Inc.*, IBCA-77 (November 30, 1960), 61-1 BCA par. 2876 (failure to protest at time wrong allegedly occurred is some evidence that no wrong was committed).

¹⁸ This is Claim No. 2 in the summary of costs on page 12 of the claim of April 28, 1972. Appellant's counsel stipulated that appellant was abandoning Claim No. 2 and would not present any evidence thereon (Tr. 104). We conclude that counsel was mistaken and that he intended to refer to Claim No. 3 concerning added costs to move a 13.8 KV power line which intersected the 500 KV line at Tower 1/1 (Tr. 112; Log of Mr. Henry Inman, appellant's foreman, for January 7, 1969, App's Exh. G) and was, *inter alia*, used as a source of power by the contractor constructing the dam.

¹⁹ Tr. 162, 143. Although Mr. Sargent referred to only the southwest tower leg as being located on a slope, the Daily Progress Report of December 19, 1968, states that legs one and four of Tower 1/2 were about one-half way up the slope. We note that the revision to the Steel Tower List (Exh. 3.1 to

the slope at approximately 60 degrees (Tr. 144). This situation is referred to in the Daily Progress Report of December 19, 1968, which quotes the subcontractor as stating that either BPA or appellant should pay for any sheet piling required to hold the fill.

It is not clear that any excavation for this tower was in progress or attempted at this time. Excavation for towers on the service line was apparently accomplished only with the backhoe described above by Mr. Sargent and we have found that excavation for these towers commenced with those of the higher number (note 8 and accompanying text). The Daily Progress Report for December 18, 1968, includes the following: "The Backhoe Completed (sic) 1/8-1/9 and got started on 1/7." It would therefore seem to be unlikely that the contractor skipped intervening towers in order to excavate for Tower 1/2. However, the Daily Progress Report for December 26, 1968 (App.'s Exh. A-1) states that the contractor dug the hole for Leg No. 1 of Tower DV-2 approximately seven feet deep and then stopped because the upper bank was starting to cave-in. The report indicates that this hole was dug on December 24, 1968.²⁰ The report dis-

appellant's claim of April 28, 1972), which changed the length of all tower legs to 20 feet, reflects that two of the legs for Tower DV-2 were originally specified to be 12½ feet in length. We find that two of the tower foundations were originally located on the slope.

²⁰ The Daily Progress Report for December 24, 1968, states that excavation for footings was in progress for Tower DB-2 and that the hole was "caveing in (sic) badly." The report is silent as to any work in progress at Tower DV-2.

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cusses the proposed use of sheet piling and in particular Leg Nos. 1 and 4 in such a manner as to leave little doubt that the tower is correctly referred to as DV-2 (note 19, *supra*).

The testimony of Mr. Burson, chief inspector for Bonneville, was to the effect that the purpose of the proposed sheet piling was to “* * * hold that dirt out of there.” (Tr. 62.) When asked whether he issued a verbal stop order to the contractor, he replied: “They stopped, because the more they dug, the more dirt they got. They weren’t gaining anything, (sic) with that little backhoe.” (Tr. 62, 63.) Mr. Burson was not on the job site during the period December 23, 1968, to January 11, 1969, and the date of this incident is uncertain. We note that the Daily Progress Report for December 30, 1968 (App.’s Exh. A-1) states in part: “Contractor has only 3 footings, complete towers, that have not been excavated on, two of them on roads.”

Mr. Sargent agreed with Mr. Burson’s testimony as to a cave-in at Tower DV-2 (Tr. 143). However, he stated that the bottom of the footing [would have] “stuck out into the air” and that the purpose of the piling was so that the area could be filled to the bottom of the foundation (Tr. 143, 144). Mr. Burson admitted that the footing on Tower DV-2 would have ended 20 feet in the air if it had been built the way it was designed (Tr. 98).

Mr. Sargent testified that he called Mr. Hussey (BPA) and that

they met at the site and inspected the tower location. He stated that he was asked by Mr. Hussey to submit a price for sheet piling and that he subsequently did so. He could not recall the date.²¹

BPA rejected the price for sheet piling as too high and decided to move Towers DV-1 and DV-2. The location of Tower DV-1 was moved ten feet and the location of Tower DV-2 was moved 12 feet on January 7, 1969.²² While it is clear that some work had been attempted or accomplished on footings for Tower DV-2 prior to January 7, the extent of this effort is uncertain.

BPA staked the hubs for Towers DV-1 and DV-2 at the revised locations on January 13, 1969 (Daily Progress Reports, App.’s Exhs. A & A-1). Mr. Inman’s log (note 18, *supra*) indicates that appellant’s employees were occupied in assembling footings for towers on the 500 KV line and in assembling towers for the service line during the period January 7 to 13, 1969, inclusive. Daily Progress Reports for this period reflect that the subcontractor was engaged in excavation for and installation of footings and backfill of footings for towers

²¹ The Daily Progress Report for December 20, 1968, refers to the proposed rental of pile driving equipment by the contractor at \$45 an hour. A subsequent report (December 23, 1968) states that Mr. Hussey (BPA) is consulting with Design Section as to the use of sheet piling at Tower 1/2 on the service line. It is likely that the meeting at the site referred to by Mr. Sargent was on or about December 23.

²² Tr. 144; Daily Progress Report for January 7, 1969, App.’s Exh. A-1; Daily Log of Mr. Henry Inman, Appellant’s foreman for January 7, 1969, note 18 *supra*.

other than DV-1 and DV-2 during this period. There is no evidence of idled equipment or manpower during this period.

Excavation for footings on Tower 1/1 at the changed location commenced on January 17, 1969 (Daily Report). For all that appears in the record, this was the first excavation accomplished for this tower. The Progress Report for January 22, 1969, states that the contractor has two footings to install on Tower 1/1 in order to complete the service line. Excavation for and installation of footings on this tower were apparently completed on February 6, 1969. Leg extensions for Tower 1/2 were delivered to the site on January 24, 1969 (Progress Report for January 27, 1969). Erection of towers on the service line was completed on February 10, 1969 (Tr. 115; Daily Progress Report).

The original claim was computed on the basis of a seven day delay period with the exact time of the delay unspecified. The claim included the rental cost of equipment allegedly idled and superintendent's time for seven days. Appellant now calculates the delay or disruption period as eight days from January 7 to 14, 1969, inclusive (Post-Hearing Brief, p. 11). There is no evidence that this claim was so much as mentioned prior to the claim letter of April 28, 1972.

Decision

Although there is no evidence of any protest or allegation, oral or

written, that appellant considered the tower relocation to be a change or that appellant was delayed or inconvenienced in any way prior to the claim of April 28, 1972, the Government has not renewed its contention that the claim is barred by appellant's failure to comply with applicable notice requirements.²³ We will consider the claim on the merits.²⁴

On brief, appellant cites the clause "Differing Site Conditions" as well as the Changes clause as affording coverage for the claim. Although we have noted a report of the subcontractor's allegation that the hub for Tower 1/2 was missing when he inspected the site, we do not think that this claim involves latent or subsurface physical conditions differing materially from those indicated in the contract or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the nature called for by the contract. Rather, we conclude that this is a matter of defective specifications within the ambit of the "Changes" clause.²⁵

²³ Counsel was advised to indicate in his brief the specific claims as to which the Government was standing on the defense of untimeliness (Tr. 8).

²⁴ We find *infra* (footnote 25 and accompanying text) that this claim is properly cognizable under the Changes clause as involving defective specifications. It has been held that such claims need only be filed within a reasonable time and before final payment. *Jos. D. Bonness, Inc.* (note 10, *supra*).

²⁵ The Government concedes that Tower DV-2 was originally located in an unfortunate spot and the record is clear that at

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The record establishes that actual or anticipated difficulties with excavation at Tower DV-2 were discussed as early as December 19, 1968. Although it is not altogether clear, we conclude that excavation at this tower was attempted prior to December 25, 1968. There is no evidence that any excavation was attempted or accomplished at Tower DV-1 prior to January 17, 1969. The decision to move Towers DV-1 and DV-2 was made on January 7, 1969, and the tower centers were restaked on January 13, 1969. It is, of course, obvious that excavation for and installation of footings for these towers could not proceed during this seven-day period. However, for all that the record shows, appellant as well as the subcontractor were fully engaged in other work during this period. We find that appellant has failed to establish that it was delayed to any determinable extent by the relocation of Towers DV-1 and DV-2.

Under the Changes clause, the adjustment for claims based on defective specifications shall include any increased cost reasonably incurred in attempting to comply with such defective specifications. We hold that appellant is entitled to recover an adjustment which includes the cost of excavation attempted or accomplished at Towers DV-1 and DV-2, including the cost of install-

ing any footings for these towers which were required to be relocated prior to the decision of January 7, 1969, to move these towers.

Although these costs were apparently incurred by the subcontractor, Kirkland, this does not alter the result. The adjustment should be completed in accordance with paragraph C of Section 2-115 entitled "Extra Work." The claim is allowed to the extent stated above and is otherwise denied.

Travelers

Among items of work required on the service line were the stringing and sagging of two preassembled power cables each consisting of three No. 2 conductors twisted together and strapped to a "19-No. 9 (sic) EHS Copperweld messenger." (Section 1-102.B of the specifications.) Additional work included the stringing, sagging and lashing together of one 795 MCM ACSR "Drake" messenger and two signal circuit cables and the stringing, sagging and lashing together of one 795 MCM ACSR "Drake" messenger, one telephone and one control cable.

Travelers are also referred to as "stringing sheaves" and are essentially pulleys attached to the cross arms of the towers or to cables referred to as "messengers" in order to support the lines being strung and facilitate stringing operations (Tr. 74-77; Drawing App.'s Exh. D; Drawing No. 127374, App.'s Exh. F). Appellant contemplated using

least one of the footings for this tower would not have been securely anchored in the earth had the tower been located and erected in accordance with the original design. Cf. *Desonia Construction Company, Inc.* (note 10, *supra*).

sheaves of 5-inch diameter for this purpose (Tr. 114, 149). For a good description of heavy conductor stringing operations, see *Bay Construction, Inc. et al.* (note 17, *supra*).

The record reflects that a discussion concerning the adequacy of the 5-inch travelers took place between Mr. Inman and Messrs. Hussey and Burson of BPA on February 6, 1969 (Inman Log for February 6, 1969, App.'s Exh. G; Daily Progress Report of even date). The cited report states that appellant had started to hang 5-inch sheaves²⁶ and that BPA had decided that sheaves of 40-inch diameter were necessary to string the two top conductors,²⁷ i.e., the power cables and copperweld messengers which were to be fastened to the upper cross arms of the towers. The larger size sheaves were considered necessary to protect the cables from possible damage due to bends.

The Daily Progress Report for February 7, 1969, reflects that Mr. Hussey instructed Mr. Burson to use 40-inch sheaves to string the power cables to the upper cross-arms. This instruction was apparently not communicated to appel-

lant.²⁸ The report states that no final decision had been made for stringing the "Drake" (actually the cables to be lashed thereto). Nevertheless the report contains the following: "Told Inman to try and find enough sheaves to put one about ever (sic) 12' to string U1—U2—TT1 and C1 [signal cables, telephone cable and control cable, respectively] through so it could be attached to the Drake Conductor (sic)."²⁹ The report quotes Mr. Inman as responding "There would have to be some changes made for the Contract (sic) did not Cover (sic) that kind of Stringing (sic)." The "Drake" messenger was to be attached to the lower cross-arms of the towers.

Appellant was told on February 13, 1969, to use 40-inch sheaves on the top two conductors (power cables) and that it could use 5-inch sheaves on the "Drake" (Daily Progress Report). Appellant was further told that it would have to find enough lined sheaves to hang one every 12 to 15 feet on the "Drake" messenger in order to string the other two cables to be at-

²⁶ Although all towers for the service line had not been erected at this time, it is normal to hang sheaves in the towers prior to erection (Tr. 132).

²⁷ The report states that the decision to require 40-inch sheaves comes from Portland (BPA Headquarters). However, Mr. Inman's log (App.'s Exh. G) reflects that Messrs. Hussey and Burson were not pleased with the size of traveler appellant proposed to use and that they had called Portland for an answer. There is no indication that appellant was directed to cease installation of 5-inch travelers at this time.

²⁸ The Daily Progress Report for February 11, 1969, reflects that Mr. Burson had called Voss Gardner, Project Engineer, and that he (Gardner) still had no information as to how power cables should be strung. See also Inman Log for February 11, 1969.

²⁹ Mr. Sargent testified that the requirement for 40-inch travelers came about because he was unable to find enough of the 5-inch size to hang one every ten to 12 feet (Tr. 150, 151). The claim indicates that the requirement for 40-inch sheaves was an alternative to finding enough 5-inch sheaves to hang one every 12 feet (Item 5, p. 9). However, the record shows that 40-inch sheaves were for stringing power cables, while the large number of 5-inch sheaves were for stringing communication and control cables.

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tached to each messenger. Mr. Sargent testified that at this time there were only two contractors in the world which had 40-inch sheaves (Tr. 150, 151). He stated that he ultimately "came up with" from 25 to 35 40-inch sheaves most of which were obtained from Power Line Erectors.³⁰ The Weekly Digest for the Week Ending February 19, 1969, states that the contractor required over 400 [5-inch] sheaves which had not yet been obtained.³¹ Mr. Sargent testified " * * * I finally managed to come up with approximately 400 of them [5-inch sheaves]." (Tr. 150.) The date these sheaves were obtained does not appear in the record.

By letter dated February 14, 1969 (Supplemental File, Item 4), appellant asserted that it began hanging travelers on the service line on February 10, 1969, and that it was directed by the inspector at the site to use a larger size traveler. Appellant further asserted that it was asked by BPA's Wenatchee Office to delay proceeding until a determination could be made as to equipment and methods to be used in stringing.³² The letter stated that on Feb-

ruary 13, 1969, a determination was made that the cables were fragile and that special methods must be used in their installation. Appellant referred to the Changes clause and stated that it regarded these verbal orders as changes. BPA denied that a change had been effected for the reason that sheaves appellant proposed to use did not comply with a drawing (App.'s Exh. F) referenced in the specification (letter dated February 20, 1969, Item 7). Appellant disputed BPA's position in a letter dated March 5, 1969 (Item 10), which stated in part: "We were then of the opinion that a verbal change order had been given us relative to the methods to be used for installing signal cable, control cable and telephone cable * * * ." ³³

Appellant requested an extension of four working days because of the order to discontinue installation of sheaves (letter, dated March 13, 1969, Item 13). This was denied by BPA for the reason that appellant was not ready to proceed with installation of sheaves and for the further reason that appellant installed small sheaves after February 14 without BPA's approval (letter, dated March 20, 1969, Item 19). This latter assertion appears erroneous since the record reflects that BPA approved the use of 5-

³⁰ The Daily Progress Report for March 18, 1969, reports the unloading of 18 40-inch sheaves and states that two of these sheaves were hung on the bottom cross-arm of Tower 1/1. See also Inman log for March 18, 1969 (App.'s Exh. H).

³¹ The number of 5-inch sheaves appellant contemplated using does not appear in the record. Mr. Sargent brought 39 small travelers to the job on February 5, 1969 (Inman log, App.'s Exh. G).

³² The date of the request was not stated. It is alleged to be February 12, 1969, in the claim letter of April 28, 1972. However, we find the date was February 10, 1969 (memorandum, dated March 18, 1969, Item 18).

³³ Although Mr. Burson testified that the 40-inch sheaves were for stringing the communication and control cable (Tr. 76), we conclude that he was mistaken. See memorandum dated February 19, 1969 (Exh. 9.1 to the claim of April 28, 1972), which establishes 40-inch sheaves were for power cables.

inch sheaves for stringing power cables provided the sheaves were hung so as to travel on the "Drake" messenger and not the power cable (Daily Progress Report for February 28, 1969). Since we find *infra* that installation of power cables did not commence until after 40-inch sheaves were delivered to the job, it is not clear whether this method of stringing power cables was actually employed.

It will be recalled that erection of towers for the service line was completed on February 10, 1969. Mr. Inman testified that they could have started stringing the "Drake" conductor on February 11, 1969, had it been on the job site (Tr. 115, 116). He asserted that the reason the "Drake" was not on the job was the limits as to the weights that could be hauled over the roads. He indicated that stringing the "Drake" should have been completed in four days (Tr. 117). The record shows that conductor, including that for the 500 KV line, was hauled to the job site from the BPA yard in Eureka on February 27 and 28, 1969, even though load limits for the roads were still in effect (Inman log; Daily Progress Report).

Mr. Inman's testimony referred to above would lead to the conclusion that equipment required for stringing was on the job by February 11, 1969. This conclusion finds some support in the Daily Progress Report for February 4, 1969, which reports the arrival of two BPA

trucks with conductors,³⁴ hardware, presses, etc., for the service line and states that just about everything needed for stringing the line was on the job. However, Mr. Inman's log for February 12, 1969, reflects that he told Jim Sargent not to bring wire stringing equipment to the job because the roads were closed to heavy loads. His log for February 13 indicates wire stringing of equipment would be coming Monday, February 17, 1969. When asked on cross-examination when "screening equipment" arrived on the job, Mr. Inman referred to the "tension machine," to the fact road restrictions were still in effect on February 21 and stated that it was delivered to the job after the 21st of February.³⁵

The two strands of "Drake" messenger were strung on March 6 and 7, 1969 (Daily Progress Report; Inman log). Stringing operations for the power cables which were to be fastened to the upper cross-arms of the towers did not commence until March 20, 1969.

³⁴ Although it is not clear, the conductor referred to could be the power cable which was to be hung on the upper cross-arms of the towers. The contract stated that this item of GFP would not be available until January 1, 1969. Telephone cable was definitely on the job by February 7, 1969 (Daily Progress Report).

³⁵ Tr. 132. The record shows that a tension machine was delivered to Kahlotus, Washington, near the job site, on January 23, 1969, Inman Log; Daily Progress Report). The evidence does not establish when this machine arrived on the job site. However, BPA gave permission for its use in stringing power cables on February 13, 1969 (Daily Progress Report; Inter-office message, dated February 13, 1969, Supplemental File, Item 3).

Decision

The Government has conceded liability on this claim subject to any delay proved by appellant (Tr. 104, 105; Post-Hearing Brief, p. 6). Accordingly, the only question before us is the amount of delay. The Government asserts that the delay should not exceed two calendar days which is the delay asserted in the claim of April 28, 1972. Appellant requests an extension of 5½ calendar days and attendant compensation (Post-Hearing Brief, p. 13).

Despite the Government's concession, there is some confusion as to whether the claim is based primarily upon the requirement for the use of 40-inch travelers to string power cables or upon the number of 5-inch travelers required to string communication and control cables. There is also a serious question as to when appellant could have proceeded with stringing operations if the questions as to the number and size of travelers had not arisen. Nevertheless, the record is clear that appellant was requested to delay installation of sheaves and that there was confusion as to the stringing methods and procedures desired by BPA. The record is also clear that appellant experienced difficulty and delay in obtaining the size and number of sheaves required by BPA. Accordingly, we fix the delay at two calendar days, the amount requested in the claim of April 28, 1972, and the delay determined by appellant's witness on the critical path method

of scheduling and analyzing contract performance.³⁶

Cleaning Steel

This claim arises because the steel for the 302-foot river crossing tower had an accumulation of dirt and other material which had to be removed before the steel could be painted. Mr. Sargent testified that the material was salt and salt burns resulting from the steel having been transported on the deck of a ship (Tr. 153).

Mr. Sargent asserted that he was asked by Mr. Hussey to submit a price for steam cleaning tower steel (Tr. 154). In a letter, dated February 8, 1969 (Item 37), appellant stated that it had obtained the services of a contractor who proposed to accomplish the cleaning for a lump sum of \$1300. A steam cleaning machine was brought to the job on Sunday, February 9, 1969 (Daily Progress Report). It appears that some attempt was made to clean the steel on that date (Tr. 155, 156; memorandum, dated February 19, 1969, Item 39). Efforts to steam clean the steel also were undertaken on February 11 and 12, 1969 (Daily Progress Report; Inman

³⁶ Mr. Radford Sinclair, an individual with extensive experience in the critical path method of scheduling and analyzing contract performance, determined the delay to performance was two calendar days (Tr. 202). His determination was made after the job was completed and was based primarily on a review of BPA records (Tr. 193, 194). We note that even appellant has not accepted his conclusions in all instances and in general, we have accorded little weight to his testimony.

log). There was some difficulty with the machine and Mr. Sargent brought a new steam cleaner to the job on February 13, 1969 (Inman log). The effort to satisfactorily steam clean the steel was unsuccessful. After Mr. Burson and Mr. Sargent called Voss Gardner, Project Engineer, it was determined that the steel would have to be wire brushed (Tr. 82, 83; Daily Progress Report). The steel was wire brushed on February 14, February 17 and February 18, 1969 (Daily Progress Reports). Final wire brushing operations of previously erected steel took place on March 14, 1969 (Daily Progress Report).

By letter, dated February 14, 1969 (Item 38), appellant referred to the requirement to steam clean and wire brush the tower steel and asserted that it regarded these verbal directives as change orders. In a letter dated March 25, 1970 (Item 42), appellant itemized costs of cleaning tower steel, including superintendence, general expense and profit, totaling \$2,438.22. This bill was rejected by BPA and the amount due computed as \$1,325 (letter, dated April 8, 1970, Item 44). The contracting officer issued a change order (Change Order D, dated August 18, 1970) establishing \$1,325 as the amount due for cleaning tower steel. There is no evidence that appellant agreed to this sum.

Appellant requested a 2½ day extension of time for cleaning the tower steel (letter, dated March 26, 1970, Item 25). BPA rejected this request upon the ground that the

cleaning work was accomplished when there was nothing else to do (letter, dated April 13, 1970, Item 27). Mr. Burson testified that the contractor didn't lose any time laying out the steel to brush since they had to lay it out in order to assemble it anyway (Tr. 82). He described the brushing as " * * * kind of a fill in job * * * " (Tr. 80.) This view appears to be based primarily on the fact that appellant was using a crane rented from Halvorsen-Mason, the contractor building the dam, to erect the tower and the crane had to be returned when needed by its owners (Tr. 93). However, a review of the Daily Progress Reports and Mr. Inman's log shows that the crane was on the job during the period February 10 through February 19, 1969.

Mr. Inman disputed Mr. Burson's description of the requirement for wire brushing. He asserted that "At that rate, all of it was 'fill-in work' then." (Tr. 119.) He stated that all 100 tons of steel in the tower had to be brushed (Tr. 120). He described the difficulty in wire brushing assembled steel and asserted that un-assembled steel was turned in order to be brushed (Tr. 121).

Mr. Sinclair evaluated the delay in cleaning tower steel as eight days (Tr. 201). On brief, appellant asserts the delay was 4½ days.

Decision

The Government has also conceded liability on this claim. Therefore, we need only determine the amount of delay.

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Bearing in mind that delay in cleaning tower steel was concurrent with the two day delay allowed for the change concerning travelers, we determine the delay at $2\frac{1}{2}$ days,³⁷ the amount requested by appellant in its letter of March 26, 1970.

Bolt Shortage

The record reflects that erection of Tower 1/1 on the 500 KV line was halted at 1:30 p.m. on Friday, February 14, 1969, because of a shortage of $3\frac{3}{4}$ -inch bolts (Tr. 123; Inman log; Daily Progress Report). Tower steel and bolts were among items furnished by the Government, Mr. Burson requested that erection be suspended until Monday so that a supply of bolts of the proper length could be obtained (Special Report, dated February 27, 1969, Item 9). When work resumed on Monday, February 17, it was determined that the drawings were in error in specifying bolts of $3\frac{3}{4}$ -inch length and that the $3\frac{1}{2}$ -inch bolts on the job were the proper length (Tr. 83, 84; Daily Progress Report). The Government was aware of errors in the drawings as to bolt lengths at an earlier date (Daily Progress Report, dated January 31, 1969).

Appellant referred to the instruction to suspend erection due to a

lack of bolts, alleged that the drawings furnished by the Government differed from the manufacturer's assembly drawings and stated that it regarded the verbal directive as a change order (letter, dated February 18, 1969, Item 6). There is evidence to the effect that Mr. Inman was told by his employees of the apparent bolt shortage at an earlier date, but that he neglected to inform Mr. Burson (Tr. 83; Daily Progress Report, dated February 14, 1969). Mr. Inman denied that this was so (Tr. 123).

Decision

The Government concedes that the delay occurred but denies that appellant's performance was thereby delayed (Post-Hearing Brief, p. 7). The Government argues that this delay was concurrent with delay in cleaning tower steel. It is further contended that this claim is cognizable as a suspension of work and that, in any event, the delay was not unreasonable.

It is true that wire brushing of tower steel was in progress on February 14, 1969. However, it is also true that appellant was instructed to cease erection until a supply of bolts of the proper length could be obtained and it is unlikely that such an instruction would have been considered necessary unless a sufficient quantity of brushed and cleaned steel was available so that erection could proceed. The record does not support Mr. Burson's testimony (Tr. 84) that brushing operations preceded erection when work re-

³⁷ We, of course, recognize that days are not apportioned for the purpose of computing liquidated damages. *J & B Construction Company, Inc.*, IBCA 667-9-67 (June 18, 1970), 70-1 BCA par. 8337. However, this rule would not be applicable to determining costs from a change or suspension of work. In any event, one-half day is allowed on the succeeding claim.

sumed on February 17, 1969 (Daily Progress Report).

We find that the specifications were defective in specifying bolts for erecting the tower of an improper length and that the Government was aware of this fact but apparently did little or nothing to correct the discrepancies. In any event, it is well settled that any delay due to defective specifications is a suspension of work for an unreasonable time.³⁸ We determine the delay due to the bolt shortage, or more properly bolt discrepancies, as one-half day.

Unusually Severe Weather

By letter, dated January 10, 1969 (Item 29), appellant requested an extension of two weeks due to unusually severe weather encountered during the period December 24, 1968, through January 4, 1969. The performance period was extended ten calendar days for this reason by Change Order B, dated January 30, 1969. On brief (p. 8) the Government has conceded that the above allowance was inadequate and that an appropriate extension would be three additional calendar days. Our review of the record convinces us that error, if any, in this concession is on the side of generosity and we accept it as the extension to which appellant is entitled for the above reason.

The record reflects that heavy snows and low temperatures were encountered during the period Jan-

uary 21 to January 31, 1969 (Inman log; Daily Progress Reports). In a letter, dated February 12, 1969 (Item 33), appellant alleged that it had lost 3½ work days during the period January 21 through January 24 and 2½ days during the period January 29 through January 31. Appellant did not specify the extension of time requested. The record shows that on four of the nine workdays between January 21 and 31, 1969, no work was performed and that only part of a day was worked on three other days (Inman log). Appellant was granted a three day extension for unusually severe weather during this period by Change Order C, dated February 27, 1969. Denial of the additional time was on the premise that appellant should have anticipated some delays due to inclement weather during this period (letter, dated February 24, 1969, Item 35).

In a letter, dated March 26, 1970 (Item 25), appellant referred to its letter of February 12, 1969, and alleged that 1968-1969 was the worst winter in history for the site area. Appellant requested a five day extension for unusually severe weather during the period, January 21 to January 31, 1969. Although admitting that the winter of 1968-1969 was of unprecedented severity, BPA denied this and other requests for additional time extensions (letter dated April 13, 1970, Item 27).

A Special Weather Summary contained in Climatological Data for the State of Washington for

³⁸ *Desonia Construction Company, Inc.* (note 10, *supra*) and cases cited at 45,766.

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January 1969 (App.'s Exh. C) includes the following:

January, in addition to being one of the coldest and snowiest on record, was, in most areas, the sixth consecutive month with above normal precipitation. This was the coldest January since 1957 and if both temperature and snowfall are considered, it was the most severe since 1950. In numerous localities, the accumulated snowfall from the beginning of the winter season through January was near or exceeded previous records for this period. * * * East of the Cascades, maximum snow depths in many localities exceeded those in January 1950.

* * * * *

In eastern Washington, average temperatures for the month were 7° to 10° below normal. Measurable precipitation, falling as snow other than during a few days the first week, was recorded on 15 to 25 days. Snow remained on the ground the entire month, with some melting and settling the first 2 weeks, followed by an increase in depths until the end of the month. Snow depths near the end of the month ranged from 10 to 20 inches in lower elevations of the Central Basin, Walla Walla, and Yakima Valleys, 20 to 30 inches on the lower slopes of the Blue Mountains, the Horse Heaven and Palouse Hills, 30 to 45 inches on the Waterville Plateau and northern valleys, and 60 to 90 inches along the eastern slope of the Cascades.

* * * * *

An outbreak of cold arctic [sic] air covered the Pacific Northwest on the 22d, remaining until the end of the month. Average daily temperatures ranged from 15° to 30° below normal. East of the Cascades, minimum temperatures dropped to zero or lower in the southern section and 15° to 30° in central and northern counties. Maximums were near or only a few degrees above zero.

* * *

Mr. Inman testified that he had worked in the winter along the Snake River and in the Pasco and Umatilla areas before (Tr. 126, 133). He referred to the area as the "banana belt" (Tr. 126). While he admitted to expecting some cold weather and snow he asserted that "* * * you don't expect it to get below zero, and stay. And the snow, no, you wouldn't ever expect that much snow over there." (Tr. 133.) He estimated the production of his men at 25 percent of normal during January 1969 (Tr. 128).

Mr. Inman's log indicates that it was 22° below zero on January 23, 10° to 15° below on January 24, cold with 12 inches of snow on January 27 and 10° below on January 29, 1969. The Daily Progress Reports state that it was 17° below on January 21 and 23, and zero at Connell and Kahlotus on January 24, that there were five and six foot drifts all the way from Connell to the Dam on January 27, zero with wind and drifting snow on January 28, and snow and 10° below on January 29, 1969. Climatological Data reflects that temperatures ranged from a high of 31° F. to a low of two below zero at Lower Monumental Dam during the period January 21 to 31, 1969. Snowfalls of 1.5 inches or more occurred at Kahlotus, Washington, during seven of these 11 days and snow on the ground totaled 18 inches on January 31, 1969 (App.'s Exh. C). Snowfall at Lower Monumental Dam is not shown in the record.

Closely associated with appellant's requests for time extensions due to unusually severe weather is the contention that it was excusably delayed due to load limits on the roads being in effect for a much longer time than normal. The road restrictions allegedly delayed delivery to the job of the larger crane which was required to complete erection of the 302-foot tower on the 500 KV line. This situation is referred to in appellant's letter of March 7, 1969 (Item 11), which states that road restrictions were initially reported to BPA in a letter of February 12, 1969,³⁹ alleges that tower erection was at a critical stage and refers to previous discussions concerning this problem. This letter was not answered because a memorandum, dated March 17, 1969 (Item 16), states that Mr. Sargent had called on Friday, March 14, 1969, and advised that the letter could be ignored because the highway restrictions had been lifted.

In a letter dated March 26, 1970 (Item 25), appellant alleged that road restrictions during the winter of 1969 were in effect for 43 days. It was stated that four days were lost in assembling and disassembling the crane (actually the boom) owned by Halvorsen-Mason, the dam construction contractor, and that an additional eight days were lost when erection crews had to be

laid off between March 11 and 20 as erection had proceeded as far as it could with the available crane. The record shows that erection of the large tower was halted on March 12, that a large crane was brought to the job on March 17,⁴⁰ and that erection was again underway on March 20, 1969 (Inman log; Daily Progress Reports).

It appears that road restrictions in Franklin County, Washington, were imposed on January 7, 1969, lifted on January 10, and reimposed on February 14, 1969 (letter from Franklin County Highway Department, dated March 17, 1971, App.'s Exh. I). Emergency restrictions on roads leading to the Lower Monumental Dam remained in effect until March 5, 1969, and all road restrictions were removed on March 12, 1969. Although admitting that he could not state that there is an average period of time for road closures or restrictions to remain in effect, the author of the letter (county engineer) expressed the opinion that 1½ weeks would be a closer approximation to average than the time such restrictions were in effect during the winter of 1968-1969.

Among BPA's reasons for denying the request for an extension due

³⁹ A copy of the letter referred to appears as Exhibit 8.1 to the claim of April 28, 1972. However, it was not in the appeal file and it is not clear that it was actually mailed or delivered.

⁴⁰ It is not clear when arrangements for this crane, which was brought to the job from Portland, Oregon, were finalized. A reference to a large crane which was to be delivered from Portland appears in Mr. Inman's log of March 14, 1969. It appears that appellant contemplated and then abandoned subcontracting erection of the larger tower (Inman log for January 22, and February 11, 1969). See also Daily Progress Reports for January 22, February 3, 10 and March 3, 1969.

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to highway load restrictions were that railroad transportation to the site was available at all times. The plan map (Gov't.'s Exh. 1-A) indicates that the job site is intersected by tracks of the Union Pacific Railroad.

Decision

The Government, while conceding that the winter of 1968-1969 in the area of the job site was severe, has denied that it was unusually severe so as to entitle appellant to an extension of time beyond that granted or conceded as being due. In an effort to buttress its case, the Government has attached to its brief summaries of Climatological Data concerning weather conditions at the Lower Monumental Dam and nearby points, where data at the Lower Monumental Dam was unavailable, for the period January 1 to February 15, during the years 1959 to 1969. Absent a reservation or stipulation at the hearing we disapprove of the practice of submitting evidence with briefs and, accordingly, strike these summaries *sua sponte*.⁴¹

While the generalized statements from Climatological Data concerning the weather for Washington as a whole and the eastern part of the

State for 1969, from which we have quoted above, are lacking in specificity as to normal weather conditions at the job site area, we find that appellant has established entitlement to an extension of two additional days for unusually severe weather conditions during the period January 21 to 31, 1969. In granting an extension due to weather conditions during this period, the Government has admitted that unusually severe weather was encountered and we conclude two days, in addition to the three days previously granted, is reasonable.

While we reject any contention that a contractor on a contract of this size could reasonably be expected to maintain a crane sufficiently large to erect the 302-foot tower on the job at all times on the premise that difficulties might be encountered in moving it to the job site when needed, we find that appellant has not established entitlement to excusable delay due to road restrictions allegedly being in effect for a longer period than normal. We are not satisfied that appellant had a definite plan for the erection of the large tower and no effort has been made to explain why the large crane could not have been transported to the site by railroad in a timely fashion.

Appellant is entitled to an extension of three calendar days, the additional time conceded by the Government, for unusually severe weather during the period December 24, 1968, through January 4, 1969, and to two additional days for

⁴¹ *K Square Corporation a/k/a Ultrascan Company*, IBCA-959-3-72 (July 19, 1973), 73-2 BCA par. 10,146. It would seem to be elementary that counsel contemplating that the Board take judicial notice of a fact has an obligation to make a timely request. In any event, see *Simms v. Sullivan*, 100 Or. 487, 198 P. 240 (1921) (variations of climate in particular places at particular times cannot be judicially known).

the same reason during the period January 21 to 31, 1969, inclusive.

Acceleration

The first mention of this claim is in the claim letter of April 28, 1972. The acceleration period was alleged to be between March 20 and May 20, 1969.

On brief appellant asserts that it is entitled to a time extension of 41.5 days for reasons set forth in the claims previously discussed. Although it is not altogether clear, this time apparently includes the 13 days previously allowed by the Government in Change Orders B & C for unusually severe weather (Tr. 203). We have determined that the additional time to which appellant is entitled, including that conceded by the Government, is ten days.

The alleged acceleration orders include a letter, dated April 3, 1969 (Item 20), which states that at the present rate of progress it is unlikely that the work would be completed by April 14, 1969, and urges appellant to take the necessary steps to place the contract work on schedule. A memorandum summarizing a telephone conversation on April 18, 1969, between Mr. D. P. Picchioni, Chief of Line Construction for Bonneville, and Mr. Sargent (Item 23), refers to the slow rate of progress on the Lower Monumental work and includes the following: "I concluded the conversation by stating that the contract was already four days late and into liquidated damages, and that everything possible should be done to complete the work

in the least possible time. He assured me that they would."

A letter to appellant from the Chief of Construction for Bonneville, dated April 30, 1969 (Item 24), refers to various occasions during the past month when the unsatisfactory rate of progress on the contract had been called to appellant's attention and closes with the following: "I request that your firm take immediate steps to complete the work on the 500 KV powerhouse line to the extent that the facility will be ready for energization no later than May 7, 1969." As we have seen, the contract was accepted as substantially complete on May 13, 1969.

Mr. Sargent stated that he was called shortly after receiving the award by Mr. Rathbun, the contracting officer. He asserted that Mr. Rathbun emphasized the importance to BPA of timely completion of the contract (Tr. 164, 165). He further asserted that he was advised by Mr. Osborne, a supervisory engineer for Bonneville, that because of the importance of this job he wasn't going to receive long extensions of time (Tr. 165, 166).

Mr. Sargent testified that he was threatened with default by Mr. Picchioni (Tr. 174, 175). He asserted that he then began working his crews seven days a week, destroying their efficiency. He indicated that at the time he received the letter of April 30, directing that the work be completed not later than May 7, 1969, he was already doing everything he could to complete the work as fast as possible (Tr. 178). He expressed the opin-

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ion that 200 men could not have finished the work one day sooner than 12 men. However, the memorandum summarizing the telephone conversation with Mr. Picchioni on April 18, 1969 (Item 23), reflects that Mr. Sargent expressed disappointment at the poor production of his crews.

Mr. Sargent's opinion that more men would not have expedited the progress of the work was not shared by BPA personnel. Statements that additional manpower was needed appear in Daily Progress Reports for March 17, April 3, April 21, May 1, 3, and 5, 1969. In addition, it appears that the condition and quantity of equipment on the job left much to be desired. For example, Mr. Inman's log for April 3, 1969, reports a request to Mr. Sargent to have a mechanic on the job in order " * * * to get some of this junk to run * * * ." It appears that the sockline for pulling 2.5-inch conductor on the 500 KV line was dropped in the river twice when the steel pulling line snapped.⁴² The 2.5-inch conductor was dropped in the river when a winch popped out of gear (Tr. 186). Mr. Sargent admitted that this latter event took six or seven days to correct (Tr. 187). The machine for pulling the 2.5-inch conductor was inadequate and additional equipment for this purpose was delivered to the job on

April 15 (a larger pulling machine) and May 9, 1969 (a D-8) (Daily Progress Reports). There was a need for additional equipment, such as ladders, as late as May 12, 1969 (Daily Progress Report).

Mr. Picchioni was of the opinion that the job was mismanaged and lacked organization, manpower and proper equipment (Tr. 216, 217). However, he denied threatening to default the contract (Tr. 219). He also disputed Mr. Sargent's testimony that he (Sargent) had made repeated oral requests to him for time extensions (Tr. 218).

The Payroll Recap (App.'s Exh. J) confirms that there was a dramatic increase in overtime costs during the period March 24 through May 17, 1969. Overtime costs total \$25,376.89, of which \$22,948.20 were incurred during this period. Mr. Sargent testified that this job was not figured for overtime and that the Recap showed the effects on costs of increased production (Tr. 179, 180).

Decision

The Government has not raised the defense of untimeliness to this claim and we will decide it on the merits. Of course, the failure to assert the claim at an earlier time is a factor to be considered in determining whether appellant has met its burden of proof (note 17, *supra*).

The requirements to ground a successful constructive acceleration claim are that it must ordinarily appear that the contractor has encountered an excusable cause of

⁴² Daily Progress Reports for April 27 and 29, 1969. The contractor's crew had a safety meeting on April 28, 1969, and refused to proceed with the work until adequate cable was secured. (Daily Progress Report, dated April 28, 1969.)

causes of delay, timely requests for extensions of the completion date have been submitted to the contracting officer, these requests have been improperly denied, the contractor has actually or by implication been ordered to complete the work in a lesser time than would have been available had the requests been granted and the contractor has accelerated performance, thereby incurring increased costs.⁴³

Appellant has established entitlement to a ten day extension of the delivery schedule in addition to that previously granted by the Government in Change Orders B & C. While we have no doubt that under appropriate circumstances the letter of April 3, 1969, urging appellant to take the necessary steps to place the work on schedule and the telephone conversation of April 18, wherein appellant was requested to do everything possible to complete the work in the least possible time, would constitute acceleration orders,⁴⁴ it is im-

mediately apparent that the ten day extension to which we have found appellant is entitled would not, even if seasonably granted, have enabled appellant to complete the work in a timely fashion.⁴⁵ In any event, on this record we are simply unable to find that the costs here claimed, chiefly overtime and labor inefficiency costs, resulted in any ascertainable degree from the denial of otherwise proper requests for time extensions, rather than from a belated attempt by appellant to overcome the effects of delays resulting from inclement weather, insufficient and inadequate equipment and other factors for which the Government was not responsible. The acceleration claim is denied.

Conclusion

The appeal is sustained in part and denied in part as follows:

Missing tower hubs—denied.

Tower relocation—sustained to the extent that appellant is entitled to an adjustment in accordance with the Changes clause for the cost of excavation attempted or accomplished at towers DV-1 and DV-2, including costs of installing footings, if any, prior to the decision to relocate these towers.

the original schedule is required. *Tyee Construction Company*, IBCA 692-1-68 (June 30, 1969), 76 I.D. 118, 69-1 BCA par. 7748 and cases cited.

⁴⁵ A claim for acceleration costs has been denied where the acceleration efforts undertaken by a contractor were insufficient to overcome delays for which the contractor was responsible. *Pan-Pacific Corp., Eng.* BCA No. 2479 (February 18, 1965), 65-2 BCA par. 4984.

⁴³ *Montgomery-Macri Co. & Western Line Construction Co., Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242 at 337-351, 1963 BCA par. 3819 at 19,056-061, affirmed on reconsideration (June 30, 1964), 71 I.D. 253, 1964 BCA par. 4292. *Cf. M.S.I. Corporation*, GSBICA No. 2429 (November 19, 1968), 68-2 BCA par. 7377, affirmed on reconsideration (June 26, 1969), 69-1 BCA par. 7750 (where contractor was ordered to increase its labor force in order to accelerate performance, the controlling factor was not whether contractor completed work on date specified by Government, but whether it actually and reasonably incurred increased costs in attempting in good faith to achieve the completion date ordered by Government).

⁴⁴ Indeed, it has been held that the crucial fact is the denial of a time extension to which the contractor is entitled because it thereby signals the contractor that compliance with

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Travelers—sustained to the extent that appellant is entitled to an extension of two calendar days and an adjustment in price for costs attributable thereto in accordance with the Suspension of Work clause.

Cleaning steel—sustained to the extent appellant is entitled to an extension of 2.5 days in the delivery schedule and an equitable adjustment in accordance with the Changes clause for any costs it can demonstrate were incurred in cleaning steel in addition to the amount previously allowed.

Bolt shortage—sustained to the extent that appellant is entitled to an extension of 1½ day and an adjustment for costs attributable thereto under the Suspension of Work Clause.

Unusually severe weather—sustained to the extent that appellant is entitled to an extension of five days in addition to that previously granted.

Acceleration—denied.

The matter is remanded to the contracting officer for appropriate action in accordance with the foregoing.

SPENCER T. NISSEN,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

SHERMAN P. KIMBALL,
Administrative Judge.

A. J. MAURER, JR. ET AL.

15 IBLA 151

Decided March 20, 1974

Appeals from decisions (W 33607, W 33608, W 33609, W 33610, and W 33611) by the Wyoming State Office, Bureau of Land Management, requiring mineral bonds larger in amount than the bonds tendered.

Affirmed.

Mineral Lands: Mineral Reservation—
Mining Claims: Surface Uses—Stock-
raising Homesteads

Since one who locates a mining claim on stock-raising homestead lands implies that he intends to reenter upon the land and that he has made a discovery thereon, he is no longer a prospector within the purview of the Stock-raising Homestead Act, and in the absence of consent of, or an agreement with, the entryman or surface owner, the mineral claimant is required to post a good and sufficient bond to assure compensatory protection to the surface owner.

APPEARANCES: A. J. Maurer, Jr., pro se; Sterling H. Clark, Esq., Clark & Hill, Belle Fourche, South Dakota, for appellant-surface owners.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF
LAND APPEALS

A. J. Maurer, Jr., mining locator, and five individual surface owners¹ have appealed separately from

¹ See APPENDIX for a listing of BLM serial numbers, appellant-surface owners, mining claims involved, and amount of bond required by the various decisions below.

decisions in which the Wyoming State Office, Bureau of Land Management, required the mineral claimant to file five bonds each in an amount larger than the five \$1,000 bonds he had tendered to the United States for the use and benefit of each respective owner of five surface estates. The lands involved were patented pursuant to the provisions of the Stock-raising Homestead Act, 43 U.S.C. §§ 299-301 (1970), with minerals reserved to the United States.

Subsequent to the submission of the individual bonds, Maurer filed a copy of a lease executed in January 1972. Therein the mineral claimant granted to a lessee the exclusive right to mine and remove bentonite from certain mining claims, including those listed in the APPENDIX hereto. The Bureau of Land Management examined the land to determine the amount of bond required to secure payment of damages to crops, tangible improvements, and the value of the land for grazing. The mineral claimant and each of the surface owners were informed by separate decisions of the Wyoming State Office of the larger amount of bond required for the protection of each surface owner (*See APPENDIX*) and of the disapproval of each of the \$1,000 bonds tendered.

Appellant Maurer, in each separate statement of reasons for appeal from each decision requiring a bond in a larger amount, states the mineral lease has been canceled. Copies of the lease cancellation were sub-

mitted prior to the filing of the appeals. He states that he now desires to do only prospecting and assessment work on the mining claims involved, but no mining until some future date when a mining contract might be negotiated. He contends, in view thereof, that the amount of the bond should be nominal. He questions whether a bond is even required until such time as actual mining and removal of mineral is about to occur, referring to and quoting portions of the Stock-raising Homestead Act, *supra*.

Each appellant-surface owner contends that the proposed bond is not large enough to cover probable losses and damages to his land and property in view of the size of the area involved and the kind of operations to be carried out.

All entries made and patents issued pursuant to the Stock-raising Homestead Act reserve to the United States the coal and other minerals in the lands entered and patented. The Act of December 29, 1916, *as amended*, 43 U.S.C. § 299 (1970), as quoted below, provides remedies for the surface owner for damages to the surface caused by a mining claimant:

* * * Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered and patented, as provided by said sections, for the purpose of prospecting for coal or other minerals therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and

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shall compensate the entryman or patentee for all damages to crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, *may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate* * * * . [Italics supplied.]²

The clear purpose of the statute is not to restrict prospecting and mining operations on land entered or patented under the Stock-raising Homestead Act, but to assure com-

pensatory protection to the homesteader or surface owner. *McMullin v. Magnuson*, 78 P. 2d 964, 973 (Colo. 1938).

A mineral prospector who locates a mining claim on stock-raising homestead land, by virtue of his mining location, implies that he has made a discovery. Thus, he is no longer a prospector³ and, absent consent of or agreement with the surface owner, prior to reentry he is required to post bond for the compensatory protection of the surface owner. Even though Maurer presently intends to reenter only for prospecting (exploration) and assessment work, prior to reentry he must post the bonds required by the Bureau of Land Management decisions. The mining claimant is not permitted to engage in mining operations on the property until a bond in the amount set for the particular property is tendered and approved.

With regard to the assertions of the surface owners alleging insufficiency of the amount of bond set in the respective decisions below, we note that they are merely general statements unsupported by probative evidence. In the absence of evidence to the contrary, we are constrained to affirm the amount of bond required as set by the Wyoming State Office based upon technical examinations of the respective surface estates.

Therefore, pursuant to the au-

² The Stock-raising Homestead Act is supplemented by the Act of June 21, 1949, 30 U.S.C. § 54 (1970), which enlarged the liability of the mineral claimant to include "any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals."

³ These findings are not intended to be a determination of the validity of the mining claims.

thority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

ANNE POINDEXTER LEWIS,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPENDIX

BLM Serial W 33607

Mining claims: Deloris Nos. 21 through 28 bentonite placer claims covering certain lands in T. 57 N., R. 63 W., 6th P.M., Wyoming, patented under the Stock-raising Homestead Act, with minerals reserved to the United States.

Surface owner-appellant: Edward B. Foster. Mineral bond in the amount of \$1,000 tendered by A. J. Maurer, Jr., disapproved and a mineral bond in the amount of \$40,000 required by decision of December 1, 1972.

BLM Serial W 33608

Mining Claims: Deloris Nos. 26 and 28 bentonite placer claims covering certain lands in T. 57 N., R. 63 W., 6th P.M., Wyoming, patented under the Stock-raising Homestead Act, with minerals reserved to the United States.

Surface owner-appellant: A. V. Edsall. Mineral bond in the amount of \$1,000 tendered by A. J. Maurer, Jr., disapproved and a mineral bond in the amount of \$6,000 required by decision of December 1, 1972.

BLM Serial W 33609

Mining claims: Deloris Nos. 29 and 30 bentonite placer claims covering certain lands in T. 57 N., R. 63 W., 6th P.M., Wyoming, patented under the Stock-

raising Homestead Act, with minerals reserved to the United States.

Surface owners-appellants: Frank H. and Helen M. Ridinger. Mineral bond in the amount of \$1,000 tendered by A. J. Maurer, Jr., disapproved and a mineral bond in the amount of \$45,000 required by decision of December 1, 1972.

BLM Serial W 33610

Mining claims: Deloris Nos. 16 through 19 bentonite placer claims covering certain lands in T. 58 N., R. 64 W., 6th P.M., Wyoming, patented under the Stock-raising Homestead Act, with minerals reserved to the United States.

Surface owner-appellant: T. J. Maupin. Mineral bond in the amount of \$1,000 tendered by A. J. Maurer, Jr., disapproved and a mineral bond in the amount of \$36,000 required by decision of December 4, 1972.

BLM Serial W 33611

Mining claims: Deloris Nos. 4 through 14 bentonite placer mining claims covering certain lands in T. 58 N., R. 64 W., 6th P.M., Wyoming, patented under the Stock-raising Homestead Act, with minerals reserved to the United States.

Surface owner-appellant: Wyotana Ranch, Inc. Mineral bond in the amount of \$1,000 tendered by A. J. Maurer, Jr., disapproved and a mineral bond in the amount of \$51,000 required by decision of December 4, 1972.

JUDGE THOMPSON CONCURRING:

I agree that the amount of the bonds to be furnished by a locator of a mining claim asserting rights under the mining laws does not depend upon his proposed activities upon the patented land, but, rather, upon possible damages based upon the value of the crops and surface

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improvements of the surface owner within the mining claims, as required under the Stock-raising Homestead Act, 43 U.S.C. § 299 (1970), and the grazing value of the land, as required by the Act of June 21, 1949, 30 U.S.C. § 54 (1970). See *L. W. Hansen*, A-31029 (December 30, 1968). This Department is charged with determining the amount of the bonds. Such a determination, however, is not a finding that the mining claims are valid. For the purpose of setting the amount of the bond, we must assume that the claims were properly located for locatable minerals.¹

The issue of the amount of the bonds turns, therefore, on whether they properly reflect the value of the crops, surface improvements of the surface owner and grazing value of the land. Appellant has made no showing that the bonds are in excess of such value. I agree that the general statements of the surface owners, without any information or data to show a higher value, are insufficient to show error in the Bureau's appraised value. Accordingly, there is no reason to disturb the Bureau's decisions in this regard.

JOAN B. THOMPSON,
Administrative Judge.

¹ The claims here are located for bentonite. A determination whether such claims are valid is beyond the scope of this decision. I note, however, that only bentonite which can be marketed profitably for commercial purposes for which common clays cannot be used, is locatable under the mining laws. *United States v. Gunn*, 7 IBLA 237, 79 I.D. 588 (1972). A contest proceeding would be necessary to determine whether these claims are valid.

ESTATE OF ALICE CORNELIA
WHITE HAT/RED FEATHER
(ROSEBUD SIOUX ALLOTTEE
NO. 4895, DECEASED)

2 IBIA 217

Decided March 26, 1974

Appeal from a decision denying petition for rehearing.

Affirmed.

245.0 Indian Probate: Guardian Ad Litem: Generally

It is the duty of an Administrative Law Judge to protect the interest of an infant party to a proceeding.

245.1.0 Indian Probate: Guardian Ad Litem: For Whom Appointed: Generally

Proper notice to minor children appears where notice has been given as required by duly promulgated rules and regulations, and the individual appointed by the Administrative Law Judge appeared at the hearing and was present at every step of the hearing.

130.0 Indian Probate: Appeal: Generally

Where the whereabouts of the natural guardian of infant or minor children is not known, it is not error prejudicial to the rights of the minor children who are potential heirs, for the Judge to appoint an individual to represent them as guardian ad litem, though he may also be a potential heir.

The burden is on the appellant to establish that the rights of the minor children have been affected during the proceedings because of such appointment.

APPEARANCES: Gary R. Thomas, Esq., for appellant, Phillip Under Baggage.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal from the decision of Administrative Law Judge Alexander H. Wilson, denying the petition of Phillip Under Baggage for rehearing.

Subsequent to a hearing held on October 3, 1972, at Rosebud, South Dakota, the Judge on December 27, 1972 issued an Order Determining Heirs of the decedent who died intestate on May 15, 1969. The Judge found that the decedent was survived by two sons and six children of a prior-deceased daughter, Jessie Red Feather Under Baggage.

The appellant who is the father and natural guardian of the grandchildren of the decedent contends that he is the proper party to represent them and their interests. He further contends that the appointment by the Judge of Rossiter J. Red Feather, a potential heir, to act in the capacity of guardian ad litem for the grandchildren is error since the interests of the guardian ad litem and the grandchildren are in conflict. We find that upon the relationship established by the record, the children were awarded their statutory share of the estate.

Regulations promulgated by the Department provide that a Judge may receive and hear proofs at a

hearing to determine heirs of a deceased Indian only after notice of the time and place of the hearing is given to all interested parties. Among other things, notice of the time and place of the hearing is required to be posted at least 20 days prior to such hearing in five or more conspicuous places in the vicinity of the designated place of hearing. A copy of the notice is required to be served on each party in interest by personal service or by mail, addressed to the party in interest at his last known address. Moreover, these regulations provide that all parties in interest are bound by the decision of the Judge if they lived within the vicinity of any place of posting during the posting period, whether they had actual notice of the hearing or not. See 43 CFR § 4.211 (a) through (c).

The record discloses that notice of the hearing to be held on October 3, 1972 at Rosebud Agency House #16, Rosebud, South Dakota, was mailed to Rossiter Red Feather, St. Francis, South Dakota, for himself and as guardian ad litem for the grandchildren in question. In addition, notices were sent by mail to other potential heirs, and to Alex Phillip Baggage, c/o Pine Ridge Agency, Bureau of Indian Affairs, Pine Ridge, South Dakota 57770. Notices were also posted at the Rosebud Agency, Bureau of Indian Affairs, and at the Post Offices at Pine Ridge, Rosebud, Mission, Okreek, Kyle and St. Francis, all in South Dakota.

The record is void of evidence showing the whereabouts of the

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grandchildren or the appellant. Consequently, in the absence of evidence to the contrary, we find that the whereabouts of the appellant and the grandchildren was not known to the Judge.

It has been consistently held that it is the duty of a court to protect the interest of an infant party in a litigation. In keeping with this duty the court may appoint a guardian ad litem to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise. See *Kingsbury v. Buckner*, 134 U.S. 650, 10 S. Ct. 638 (1890).

The Department adheres to this same concept in proceedings where a minor is concerned.

The Board finds based upon the complete record that the Judge gave due and sufficient notice of the time and place of the hearing to all interested parties and that the guardian ad litem appointed by the Judge to represent the minor children appeared at the hearing and was present at every step of the hearing.

The appellant contends that Rositer James Red Feather, guardian ad litem, was unfit to act as guardian because he too was a potential heir, and as such could not protect the interests of the minors.

It was within the power of the Judge, under whose watchful eyes that the guardian ad litem acted, at any time to inquire into his fitness to represent the interests of the minors, to remove him if he was a mere intermeddler, and to allow someone

to be substituted in his place. See *Kingsbury v. Buckner, supra*.

The appellant fails to allege a single incident or act by the guardian ad litem either during or after the proceedings to substantiate his implied contention that the rights of the minor children were in some way prejudiced or irreparably damaged.

Accordingly, we find that the minor children were properly represented and that their rights were fully protected. Moreover, we conclude that the burden is upon the appellant to allege and establish that the rights of the minor children were adversely affected during the course of the proceedings and by the ultimate decision based thereon.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS HEREBY ORDERED:

That the Order Determining Heirs dated December 27, 1972, in the above-entitled matter, be, and the same HEREBY IS AFFIRMED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

UNITED STATES STEEL CORPORATION

3 IBMA 50

Decided *March 26, 1974*

Appeal by United States Steel Corporation from a decision by an Administrative Law Judge (Docket No. BARB 73-72), dated October 9, 1973, dismissing appellant's application for review under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

An application for review of a section 104(a) order is properly dismissed where the operator fails to rebut by a preponderance of the evidence the presumption of imminent danger which arises when the order is issued.

APPEARANCES: Billy M. Tennant, Esq., for appellant, United States Steel Corporation; J. Philip Smith, Assistant Solicitor, Richard V. Backley, Assistant Solicitor, and I. Ayrum Fingeret, Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On July 18, 1972, during an in-

spection of the Concord No. 1 Mine operated by United States Steel Corporation (operator) located at Concord, Jefferson County, Alabama, a Mining Enforcement and Safety Administration (MESA) inspector observed a shuttle car running over an energized trailing cable to a loading machine. The cable was lying on the mine floor, which was wet and muddy. A section 104(a) withdrawal order was immediately issued requiring all power to the section be removed and all persons in the affected area, except section 104(d) personnel, be withdrawn.

A timely application for review was filed by appellant, and reply by MESA, and an evidentiary hearing, with both parties represented by counsel, was held before an Administrative Law Judge (Judge) whose decision, holding for MESA, is being appealed to the Board.

When the incident occurred, the circuit breaker did not trip, nor was there any arcing or smoking, or overt cable damage when the de-energized cable was inspected. At the hearing, there was unrefuted expert testimony by MESA that none of the above need be present for there to be an electrical shock hazard from a broken cable, especially in light of the wet conditions on the floor of the mine. The Judge held that imminent danger had existed as that term is defined in the Federal Coal Mine Health and Safety Act of 1969 (Act), and the application for review was dismissed.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

March 26, 1974

*Issue Presented***ORDER**

Whether the Judge erred in concluding, as a matter of law, that the condition cited in the order constituted imminent danger such as would support a section 104(a) order of withdrawal.

Discussion

The facts of this case are undisputed but the operator contends that the conditions cited do not support a conclusion of imminent danger and that the order should be vacated.

In a section 105(a) proceeding involving review of a section 104(a) withdrawal order, the Judge is required to look at the facts as they existed at the time of the issuance of the order and to determine whether it was reasonable for the inspector involved to have believed that death or serious injury could have resulted from the condition cited. This test was properly applied by the Judge to the facts in the instant case and is the same test enunciated by the Board in *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide, par. 16,567 (1973). Having reviewed the record and considered the briefs submitted by the parties, the Board finds that appellant has not shown any reason why the findings of fact, conclusions of law and decision of the Judge should not be affirmed.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the dismissal of the application for review in the above-entitled case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

ZEIGLER COAL COMPANY

3 IBMA 54

Decided March 26, 1974

Appeal by Zeigler Coal Company from a decision by an Administrative Law Judge (Docket No. VINC 72-76), dated October 29, 1973, dismissing appellant's application for review of a section 104(a) order of withdrawal.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

An inspector's conclusion that imminent danger existed at the time a section 104(a) order was issued will not be vitiated by the fact that he permitted the subject of the order, a shuttle car, to be moved under his close supervision.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

A shuttle car, as a piece of equipment used in a coal mine, may properly be the subject of a section 104(a) withdrawal order.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; J. Philip Smith, Assistant Solicitor, and John P. McGeehan, Trial Attorney for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE ROGERS

*INTERIOR BOARD OF
MINE OPERATIONS
APPEALS*

*Factual and Procedural
Background*

While performing his normal duties, a shuttle car operator, for undisclosed reasons, was forced to stop his shuttle car by running it into a cinder-block stopping. Thereafter, he complained to a Mining Enforcement and Safety Administration (MESA) inspector that the car's steering was unsafe and that it lacked a safe-off switch. As a result of the inspection initiated by the complaint, the inspector issued a section 104(a) withdrawal order prohibiting operation of the car and citing the dangerous conditions to be as follows:

The Joy 420 battery-powered shuttle car, serial no. 3286, company no. 5, was not being properly maintained in a safe operating condition: the reset and safe-off switches were broken, wiring for the battery charging unit and two traction motors and one conveyor motor was not properly insulated, there was excessive

play in the steering linkage [six times the properly maintained amount], there was no headlight on the loading end and a bursted globe in the discharge end light.

After being issued the order, Zeigler Coal Company (Zeigler) stated that the car was in a heavy traffic area and requested permission of the MESA inspector to move it. The inspector permitted it to be moved 125 feet under his supervision.

After a timely application for review of the order was filed by Zeigler and reply by MESA, an evidentiary hearing, with both parties represented by counsel, was held before an Administrative Law Judge (Judge), whose decision, holding for MESA, is the subject of this appeal to the Board.

The Judge found that the conditions cited in the order constituted imminent danger and that it was necessary to discontinue use of the car in order to repair it. The Judge concluded that, since the car was regularly used in the normal operation of the mine and its use created an imminently dangerous condition with respect to the cars operator, passengers, and any workers in the mine where the vehicle might travel, the inspector's issuance of a § 104(a) withdrawal order, which was intended to and did remove this imminently dangerous mobile piece of equipment from normal mining operations, was proper.

Zeigler contends that the conditions cited in the order did not constitute imminent danger and that the withdrawal order was improperly issued.

March 26, 1974

Issues Presented

A. Whether a section 104(a) order can properly be issued limited to a piece of equipment used in a coal mine.

B. Whether the conditions cited in the order constitute imminent danger as that term is defined in the Federal Coal Mine Health and Safety Act of 1969 (the Act).¹

Discussion

A.

Section 3(h) of the Act defines "coal mine" as "* * * an area of land and all structures, facilities, machinery, tools, equipment, * * * placed upon, under, or above the surface of such land * * * used in, * * * the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth * * *." In our view a shuttle car constitutes part of a coal mine, and we think the inspector properly determined that an "imminent danger" situation was created by the shuttle car itself. We, therefore, conclude that the Judge's decision that a section 104(a) order can properly be issued on a piece of equipment was correct.

B.

In any determination of imminent danger, it is necessary to determine if the facts of the case support the conclusion of the inspector involved. In the instant case, the

conditions cited in the order are undisputed. Zeigler questions whether they constitute imminent danger. Based on the definition of "imminent danger" in section 3(j) of the Act,² the Board finds that the conditions cited could have resulted in death or serious injury had they not been abated prior to returning the car to normal operation. However, the question arises as to how imminent is the danger if the inspector permitted the car to be moved prior to abatement. Since the men repairing the car are considered to be section 104(d) personnel and are permitted to remain in the area covered by a section 104(a) order, and leaving the car in a heavy traffic area would hamper its repair and present another hazard to those repairing it, and since the move was supervised by the inspector, the Board finds that the inspector was justified in permitting the move and that permitting the move does not vitiate the inspector's conclusion that imminent danger existed. Accordingly, the Board concludes that the issuance of the section 104(a) order was proper.

Further, based on the decision of the Board in *Eastern Associated Coal Corporation*, 2 IBMA 128, 137, 80 I.D. 400, 404, CCH Employ-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² Section 3(j) of the Act, 30 U.S.C. § 802(j), defines "imminent danger" as follows: "imminent danger means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such conditions or practices can be abated"; See also, *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide, par. 16,567 (1973).

ment Safety and Health Guide par. 16,187 (1973), we reject Zeigler's contention that the inspector should have taken some alternative action which would have achieved the same result, rather than issue a section 104(a) order.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision in the above-captioned case dismissing Zeigler's application for review IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

JACK Z. BOYD
(ON RECONSIDERATION)

15 IBLA 174

Decided *March 27, 1974*

Appeal from a letter decision of the State Office, Anchorage, Alaska, Bureau of Land Management, notifying appellant that his notice of location (AA-8438) is unacceptable for recordation.

Affirmed.

Alaska: Homesteads—Alaska Native Claims Settlement Act Generally—Homesteads (Ordinary): Lands Sub-

ject to—Withdrawals and Reservations: Effect of—Words and Phrases

Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described including the homestead land; as to the homestead land the withdrawal becomes effective *eo instanti* upon termination of the homestead entry.

Alaska: Homesteads—Alaska Native Claims Settlement Act—Homesteads (Ordinary): Lands Subject to—Withdrawals and Reservations: Effect of

A notice of location filed pursuant to the homestead laws but embracing land covered by a withdrawal is unacceptable for recordation.

APPEARANCES: Thomas E. Meacham, Esq., Ely, Guess and Rudd of Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Jack Z. Boyd has appealed¹ to the Board of Land Appeals from a letter decision of the State Office, Anchorage, Alaska, Bureau of Land Management dated August 24, 1973, notifying him that his notice of location filed July 23, 1973, pursuant to the Act of April 29, 1950 (64 Stat. 94), *as amended*, 43

¹ By separate letter dated January 14, 1974, counsel for appellant has requested advice as to the effect of a disallowed homestead entry upon the requirements for habitation, settlement and cultivation. Since such questions are not a part of the appeal to the Board, the letter is returned to the State Office for appropriate action.

March 27, 1974

U.S.C. § 270 (1970), was unacceptable for recordation. Pursuant to the discretionary authority of the Board under 43 CFR 4.412, the appeal had been summarily dismissed, but in view of information now available it is appropriate to reconsider the dismissal so that the case may be decided on its merits.

In his notice of location, appellant asserted that occupancy was initiated June 29, 1973. The State Office determined that the notice of location was unacceptable for recordation because the land was withdrawn by the Alaska Native Claims Settlement Act, on December 18, 1971 (85 Stat. 696), 43 U.S.C. § 1610 (Supp. II, 1972). That Act withdrew the entire township for village purposes in settlement of the claims of the Eskimo, Aleut and Indian Natives of Alaska. The township was further withdrawn by Public Land Order 5184, dated March 9, 1972, 37 F.R. 5588, which withdrew for classification or reclassification some of the areas withdrawn by section 11 of the Alaska Native Claims Settlement Act. Public Land Orders 5150, dated December 28, 1971, 36 F.R. 25310, and 5151, December 29, 1971, 37 F.R. 142, also withdrew the land for a utility and transportation corridor.

Appellant contends in his statement of reasons that the lands involved were included within the homestead entry of John L. Peden (AA-2997) prior to the dates of the law and orders cited by the State Office. Appellant states that

Peden's entry expired without the filing of final proof on July 1, 1973. Appellant argues that (1) since, at the time of the withdrawals, the lands were covered by the existing valid homestead entry, the lands were excepted from the operation of the withdrawals by the provision in the law and the orders that the withdrawals are "subject to valid existing rights," and (2) upon expiration of Peden's rights the land became open to appropriation under the homestead laws.

In a somewhat similar appeal, *Paxton J. Sullivan*, 14 IBLA 120, 80 I.D. 810 (1973), the Board ruled against an application for homestead entry filed for withdrawn land after expiration of a prior homestead entry. In *Sullivan*, the Board cited a 1935 *Solicitor's Opinion*, 55 I.D. 205 which discussed at 208 the meaning of the phrase "subject to existing valid rights":

Unquestionably, the President, acting under the authority granted him in the act of June 25, 1910 (36 Stat. 847), as amended, could withdraw land which is already appropriated, reserved, or withdrawn. Such a withdrawal, however, could take effect as to land already appropriated, reserved, or withdrawn, only upon the valid extinguishment of the prior claim or withdrawal. Compare 5 L.D. 49; 10 L.D. 144; 15 L.D. 2; 32 L.D. 395; 50 L.D. 262. In such a case the Executive withdrawal acts as a claim to the land secondary to that which already exists. As such, it lies dormant until the extinguishment of the prior claim, at which time it can and does actively attach to the land.

It is, of course, not necessary for the President to exercise his powers to the

fullest extent; and, in a given case he may desire to exclude from a withdrawal all lands theretofore appropriated, reserved or withdrawn. A determination of the intention of the President is dependent upon the terms of the order itself; and where an intention not to include such land is expressed, the withdrawal would not attach to the theretofore withdrawn lands or other lands excluded from the scope of the order. Compare 29 L.D. 533; 30 L.D. 515.

The Executive order here in question purports to withdraw "all of the vacant, unreserved, and unappropriated public land", in certain enumerated States. This withdrawal clause is not wholly free from ambiguity. It might indicate an intention to have the order cover only such lands as were vacant, unreserved, and unappropriated at the moment the order was signed. On the other hand, it might be held that the order was intended to attach actively to all vacant, unreserved, and unappropriated lands, and hence to cover all lands which might become vacant, unreserved, and unappropriated during the life of the order.

I believe that the withdrawal clause, contained in the Executive order of November 26, 1934, properly should be construed in the latter sense. This conclusion is fortified by the express provision in the order that "the withdrawal hereby effected is subject to existing valid rights." There would be no necessity for such a provision unless the withdrawal embraced appropriated lands. If it did not, there could be no "existing valid rights" requiring protection.

Consequently, considering the Executive order as a whole, I hold that while it operates to save valid appropriations, reservations, or withdrawals during the period of their existence, it actually attaches to those lands as a secondary claim and becomes effective upon the termination of the prior claim.

It is clear, therefore, that where land is withdrawn "subject to valid

existing rights," the withdrawal attaches, to all the land described, as of the date of the withdrawal. As to land in a homestead entry, the withdrawal becomes effective *eo instanti* when rights under the entry terminate. *Cf. Dale R. Lindsey*, 13 IBLA 107 (1973).

Regarding the land here involved, at the time Peden's rights terminated the withdrawals became effective. Appellant acquired no right to the land covered by the withdrawals. It was proper for the State Office to rule that the notice of location was unacceptable for recordation.²

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

² Compare also the Board's holding in *Sullivan*, *supra*, that a public land application embracing land in a withdrawal must be rejected. *Accord, Curtis Wheeler*, 8 IBLA 148 (1972). *Sullivan* cites 43 CFR 2091.1, which provides in part:

"* * * [A]pplications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in the land, when approval of the application is prevented by:

(a) Withdrawal or reservation of the lands;

(b) An allowed entry or selection of record * * *."

*March 29, 1974***EASTERN ASSOCIATED COAL CORP.****3 IBMA 60***Decided March 29, 1974*

Appeal by Eastern Associated Coal Corporation from a decision dated September 4, 1973, dismissing Applications for Review of imminent danger withdrawal orders in Docket Nos. HOPE 73-326 and HOPE 73-341.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Presence of 1.5 volume per centum or more of methane supports issuance of a section 104(a) withdrawal order. Good faith in the voluntary withdrawal of miners and commencement of efforts to abate prior to issuance will not invalidate a withdrawal order.

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; Michael T. Heenan, Esq., Trial Attorney, J. Philip Smith, Esq., Assistant Solicitor, for appellee, Mining Enforcement and Safety Administration.

*OPINION BY
ADMINISTRATIVE
JUDGE DOANE*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

Eastern Associated Coal Corporation (Eastern) appeals to the Board to reverse a decision, dated September 4, 1973, wherein the Administrative Law Judge (Judge) dismissed two Applications for Re-

view of imminent danger withdrawal orders issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.¹ Eastern claims that the instances of concentrations of methane in excess of 1.5 per centum which gave rise to the instant withdrawal orders did not constitute imminent dangers because the record does not support findings that the belt, a potential source of a spark, was energized at the relevant times. Eastern also argues that the orders should not have been issued since it had taken all proper precautionary measures to deal with an accumulation of methane as required by section 303(h) (2) of the Act.

With respect to the first contention, we have heretofore held that section 303(h) (2)² necessarily requires that a methane accumulation in excess of 1.5 per centum constitutes a per se imminent danger. *Pittsburgh Coal Company*, 2 IBMA 277, 80 I.D. 656, CCH Employment Safety and Health Guide par. 16,776 (1973). Eastern has shown no reason to cause us to reconsider our previously stated view and consequently we reject its argument on this point.

Turning to the second contention, we hold that evidence to the effect that an operator is already seeking in good faith and with due dili-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² In relevant part, section 303(h) (2) reads: "If at any time the air at any working place * * * 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of this Act, shall be withdrawn * * *".

gence to abate a condition which constitutes an imminent danger at the time a withdrawal order is issued is irrelevant to that order's validity. As the Board stated in a previous opinion:

* * * Although prior evacuation of miners, or voluntary work stoppage by an operator may be laudatory and indicate concern for the safety of the miners, such actions, although taken in all good faith, cannot operate to eliminate an otherwise imminently dangerous condition or practice. Likewise, the fact that the process of abatement may have commenced prior to the issuance of the order, and that the time required for abatement may be brief, does not in our view serve to invalidate the order.³

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision appealed from IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

ZEIGLER COAL COMPANY

3 IBMA 64

Decided March 29, 1974

Appeal by the Zeigler Coal Company from an Administrative Law Judge's decision (Docket No. BARB 73-124),

³ *Eastern Associated Coal Corp.*, 2 IBMA 128, 136, 80 I.D. 400, 404, CCH Employment Safety and Health Guide par. 16,187 (1973), *aff'd sub nom Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, No. 73-1859 (4th Cir. February 12, 1974).

dated September 14, 1973, vacating an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Consolidation

Consolidation of an application for review (section 105) and a petition for assessment (section 109) proceedings involving the same Order of Withdrawal or Notice of Violation is not required in the absence of a request therefor.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Scope of Review

An Administrative Law Judge is limited in a section 105(a) proceeding concerning a section 104(a) withdrawal order to a determination of, first, whether the conditions cited in the order, in fact, existed and, second, whether these conditions constitute imminent danger.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, John P. McGeehan, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On September 1, 1972, appellant filed an application for review of a

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

March 29, 1974

section 104(a) withdrawal order. The order was issued for imminent danger and cited nine conditions or practices which allegedly constituted imminent danger. In vacating the order for lack of imminent danger, the Administrative Law Judge (Judge) specifically refused to rule on whether any of the cited conditions or practices constituted violations of the Federal Coal Mine Health and Safety Act of 1969 (the Act), stating that the existence of any such violation was not in issue in a case involving the validity of a section 104(a) order of withdrawal. At the hearing, appellant presented two witnesses who testified that the conditions cited in the order had existed, but that they did not constitute imminent danger. The Mining Enforcement and Safety Administration (MESA) presented no evidence; in fact the inspector who issued the order was deceased at the time of the hearing, and it relied on the record. Based on the evidence, the Judge found that the conditions cited in the order had existed and that they did not constitute imminent danger. On this appeal, the sole question before the Board is whether it was error for the Judge to refuse to rule that the conditions cited in the vacated order could not be the subject of a future penalty proceeding. Appellant also contends on appeal, for the first time in the proceeding, that the Judge erred in not consolidating, *sua sponte*, the section 105(a) proceeding and the section 109(a) proceeding stemming from the same

Order of Withdrawal. Appellant did not at any time move for such consolidation.

Issues Presented

A. Whether the vacation of a section 104(a) order of withdrawal in an application for review proceeding forecloses the filing or adjudication of a separate proceeding for assessment of civil penalties on alleged violations of mandatory health or safety standards cited in the order of withdrawal.

B. Whether it is error for an Administrative Law Judge not to consolidate, *sua sponte*, a section 105 proceeding and a section 109 proceeding involving the same alleged violations of the Act in the absence of a request therefor.

Discussion

A.

In *Eastern Associated Coal Corporation*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16, 187 (1973), the Board stated that " * * * where a section 104(a) order is vacated, the condition or practices described in such order may, nevertheless, constitute violations of mandatory safety standards, subject to penalty assessments * * *."

The sole question on review in this case is whether the conditions or practices cited in the order constitute imminent danger. The record reveals that the conditions cited were admitted to exist by appellant, but the conclusion of imminent danger was contested. Therefore, the Judge was justified in limiting his decision to vacation of the order for

lack of imminent danger. Only if the conditions cited were contested and found not to have existed would the Judge's decision be *res judicata* in a subsequent penalty proceeding.

B.

The operator also contends that the Judge should require consolidation of a section 109 proceeding and a section 105 proceeding or that MESA should move for consolidation if it intends to seek penalty assessments.

We view consolidation as a procedural matter within the discretionary administrative authority of a Judge to regulate hearings. Under the rules, neither party is required to request or prohibited from requesting consolidation in appropriate cases, nor is the Judge barred from consolidating either *sua sponte* or upon request, where it is appropriate and practical. However, we cannot conclude that it was error for the Judge not to have consolidated the section 105 and section 109 proceedings, where no request therefor was made. (See *Amigo Smokeless Coal Company*, 2 IBMA 310, 80 I.D. 725, CCH Employment Safety

and Health Guide, par. 16,895 (1973)).

Although appellant requested oral argument in this case, the Board, after consideration of the record below and the briefs of the parties, feels that it is unnecessary and, therefore, will deny the request.

In light of the foregoing discussion, we are not required to rule on appellant's request that the Board dismiss with prejudice the *penalty* proceeding involving the conditions cited in the subject order.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the Judge's Decision and Order of September 14, 1973, in the above-entitled proceeding IS AFFIRMED and the request for oral argument IS DENIED.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

April 4, 1974

**APPEAL OF CARL W. OLSON
& SONS COMPANY**

IBCA-930-9-71

Decided April 4, 1974

**CERTIFIED—RETURN RECEIPT
REQUESTED.**

Contract No. 14-06-D-6662, Specifications No. DC-6703, Earthwork, Concrete Lining and Structures for San Luis Drain, Bureau of Reclamation.

Rules of Practice: Appeals: Discovery—Administrative Procedure: Public Information—Confidential Information

The resolution of claims of privilege requires an adjustment of the divergent interests involved on an *ad hoc* basis; accordingly, the Board finds that documents furnished a contracting officer by Government personnel regarding a claim filed for an equitable adjustment are not entitled to be withheld on the ground that they are internal advisory memoranda prepared in contemplation of litigation since, on balance, they relate only to factual matters and, having been furnished the contracting officer prior to issuance of his decision, are not considered to have been prepared in anticipation of litigation. Documents consisting of calculations and drafts of proposed findings of fact are considered to bear upon the mental processes, deliberations, computations and methods by which the contracting officer arrived at his decision and are privileged.

APPEARANCES: Mr. Richard W. Smith, Attorney at Law, Woods, Aitken, Smith, Greer, Overcash & Spangler, Lincoln, Nebraska, for ap-

pellant; Messrs. William A. Perry, Albert V. Witham, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY ADMINISTRATIVE
JUDGE KIMBALL**

**INTERIOR BOARD OF
CONTRACT APPEALS**

*Order Ruling Upon Claims of
Privilege*

In the course of producing various documents for the appellant's inspection, the Government withheld eight which it claims are privileged. Pursuant to an Order dated September 14, 1973, the documents have been transmitted to the Board for *in camera* review, in order to determine if the Government's claims should be upheld.

The documents in question are:

(1) A memorandum dated August 12, 1970, from the Project Construction Engineer to the Civil Engineer, consisting of six pages, transmitting a draft of a findings of fact of 32 pages.

(2) A memorandum dated September 18, 1970, from the Project Construction Engineer, to the Director of Design and Construction, transmitting handwritten computations in connection with the appellant's claim (which is dated June 11, 1970).

(3) A memorandum dated September 24, 1970, from the Regional Director to the Project Construc-

tion Engineer, relating to geologic and groundwater conditions involving appellant's claim.

(4) An undated, unsigned memorandum, consisting of nine pages, commenting on the appellant's claim of June 11, 1970, by J. P. Bara (according to Department Counsel's Memorandum, dated October 4, 1973). Mr. Bara's function is not shown.

(5) A draft, undated, of findings of fact and decision prepared, according to Department Counsel, in the Office of the Director of Design and Construction, consisting of eighteen pages.

(6) An undated, handwritten memorandum from the Chief, Construction Branch No. 1 to the field engineer, transmitting four pages of handwritten comments by the chief inspector relating to certain pages of the appellant's claim.

(7) A memorandum consisting of five pages, dated July 10, 1970, relating to the appellant's claim, from the Chief, Construction Branch No. 3, which includes his memorandum of December 11, 1969, and notes covering work from March 10, 1969, to April 23, 1969, and a list of equipment used by the appellant.

(8) A memorandum dated July 9, 1970, from Chief, Materials Branch to Field Engineer, regarding a specific page of appellant's claim.

The Government's position is that the documents should be withheld because they—

* * * were prepared subsequent to appellant's claim [,] * * * contain opinions and conclusions of the authors concerning the claim [,] * * * are internal confidential communications, advisory in nature, prepared for the Contracting Officer or his subordinate officials as part of the decision-making process made necessary by this claim * * * [and] all fall squarely within the rule * * * that intra-agency advisory opinions are privileged.

In its view, the documents "are not subject to discovery save for the most compelling reasons not present here." In addition, the proposed findings of fact were withheld on the ground that they are drafts.

The appellant contends that withholding the documents is contrary to the spirit of full disclosure favored by the Freedom of Information Act (5 U.S.C. § 552 (1970)). It acknowledges the existence of a privileged status for "inter-agency or intra-agency memorandums or letters" under sec. 552(b) (5) of the Act,¹ but asserts that the documents in question are not covered thereby where the Government is acting in its contractual capacity, as it is here. The drafts of proposed findings of fact are said to be discoverable in connection with appellant's allegation of arbitrariness on the part of the contracting officer.

¹ 5 U.S.C. § 552(b) (1970) reads:

"This section does not apply to matters that are—

* * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

* * * * *

April 4, 1974

The production of documents for the appellant's inspection has been taking place pursuant to Sec. 4.116 of our rules.² Invocation of the Freedom of Information Act in support of disclosure does not enlarge the availability to a contractor of intra-agency documents. Sec. 552(b)(5) clearly provides that intra-agency memoranda are public information only insofar as they would be available "by law." Thus, the discoverability of such materials under our rules is unaffected by the Freedom of Information Act.³ Written information which is subject to disclosure under Board procedures is not protected from discovery by the sec. 552(b)(5) exemption.⁴

Both parties have cited a number of court and board decisions in support of their respective views. Precedents in this area, however, at most provide guidance only, and carry far less authority than they

would in ordinary circumstances.⁵ Questions of privilege are more properly decided on an *ad hoc* basis and not in the abstract.⁶ For this reason, appellant's assertion that the doctrine of privilege is inapplicable in a contract dispute need not be passed upon. Generalized limitation or abrogation of the principle where the Government is acting in its contractual capacity is not, in our opinion, a matter for a board of contract appeals to determine in the first instance.

To resolve a claim of privilege, we must effect an adjustment between important but divergent interests. On the one hand, established public policy requires an open and free exchange of opinions and recommendations among Government personnel. The belief that routine disclosure of such communications would seriously inhibit frank discussion and would thereby impede the administrative process has long been held.

On the other hand, an equally powerful factor to be considered is the need of a litigant for the information in question. This case is, as we have said in an earlier proceeding, one "of potentially greater magnitude and considerable complexity." Our overriding aim is to

² "Sec. 4.116 Interrogatories to parties; inspection of documents; admission of facts.

"For good cause shown, the Board may * * * order a party to produce and permit inspection and copying or photographing of designated documents relevant to the appeal. * * * Such permission will be granted and orders entered as are consistent with the objective of securing just and prompt determination of appeals."

³ *Allison & Haney, Inc.*, IBCA-587-9-66 (June 19, 1967), 74 I.D. 178, 183 n. 11, 67-2 BCA par. 6401; 4 *Moore Federal Practice* par. 26.61 [4. -3], at 26-277 (2d ed. 1974).

⁴ *Pleasant Hill Bank v. United States*, 58 F.R.D. 97, 100 (W.D. Mo. 1973). See Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047, 1050-51 (1973).

⁵ *Wood v. Breier*, 54 F.R.D. 7, 11 (E.D. Wis. 1972).

⁶ *Wood v. Breier*, note 5, *supra*; *Allison & Haney, Inc.*, IBCA-587-9-66 (September 13, 1968), 68-2 BCA par. 7242, at 33,684-85, and cases cited therein.

provide a speedy, just and inexpensive forum. Inspection by the appellant of the documents withheld might reduce the length of the hearing and even speed ultimate disposition of this appeal.

The Government has pointed out that the documents in question were prepared subsequent to June 11, 1970, the date of the appellant's claim. As such, according to Department Counsel, they constituted privileged internal advisory memoranda, opinions and recommendations relating to the contracting officer's decision-making process. The appellant, however, has expressed the belief that the documents are mainly factual, and contends that factual data are not privileged.

Ordinarily, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, materials prepared in anticipation of litigation are available "only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable *without undue hardship* to obtain the substantial equivalent of the materials by other means." (Italics supplied.) It is the Government's position that no such demonstration has been made.

It appears that the documents in question were prepared in the course of evaluating the appellant's proposal for an equitable adjustment. At that stage whatever differences existed between the parties had not

ripened into a dispute. The contracting officer thereafter issued a findings of fact and decision dated July 26, 1971 (Appeal File Exhibit 20), in which an equitable adjustment was made, although not to the extent claimed by the appellant. Only at that point, after the parties were unable to agree upon the amount of an adjustment, can it be said that a dispute arose. Under the circumstances we are unable to find that the documents sought were prepared in anticipation of litigation, as contemplated by Rule 26(b)(3).⁷

In *Vitro Corporation of America*,⁸ this Board laid down six tests to be utilized in determining if documents sought by a contractor are subject to disclosure where the Government claims they are privileged. Since that decision discovery practice before boards has increased dramatically but the guidelines are still sound in most circumstances. They are: (1) the relevancy of the documents to the subject matter involved in the appeal; (2) the necessity of the documents for proving appellant's case; (3) the seriousness of the danger to the public interest which disclosure of the documents would involve; (4) the presence in

⁷ See *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717 (August 16, 1973), 73-2 BCA par. 10,205, at 48,104. It should be noted also that the Federal Rules of Civil Procedure are not binding on administrative agencies, including this Board. *Carl W. Olson & Sons Co.*, IBCA-930-9-71 (April 18, 1973), 73-1 BCA par. 10,009, at 46,960 and n. 2.

⁸ IBCA-376 (August 6, 1964), 71 I.D. 301, 310, 1964 BCA par. 4360.

April 4, 1974

the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal.

Our examination of the materials being withheld reveals that items 1 (except for the draft of findings of fact), 3, 4, 6, 7 and 8, are relevant and are essentially factual in nature. They contain statements of fact and factual analysis. Whatever opinions or recommendations that are included relate to those factual matters and not to matters of policy or policy formulation.⁹ As the Armed Services Board of Contract Appeals has said: "The 'advisory opinions' that executive privilege is designed to protect . . . contain ideas and points of view on legal and policy matters as distinguished from factual matters."¹⁰

At the same time, the Government has not shown that disclosure of these documents would involve serious danger to the public interest, nor unduly impair the existence of confidential relationships. The Government has merely made a general assertion of privilege as to each document. When a document is claimed to be privileged it is incumbent upon

the Government to specify the particular passage said to be protected.¹¹

In the last analysis, however, a decision to hold a particular document privileged represents above all a judgment that such material would not flow freely within an agency if public disclosure were expected.¹² The view has been expressed, in this regard, that factual investigations, such as evaluations of contract claims, "will not foreseeably dry up because of the possibility of future disclosure . . ." but, on the contrary, "the knowledge of possible future disclosure" will "bring to bear a greater incentive for the investigators to be fully accurate. . . ."¹³

We find that the appellant has demonstrated a need for the inspection of items 1 (except for the draft findings of fact attached thereto), 3, 4, 6, 7 and 8, for purposes of discovery. On balance we hold that these documents are not privileged and the Government is hereby directed to make them available to the appellant at a time to be arranged between counsel.

On the other hand, items 2 and 5 and the draft of a proposed findings of fact and decision attached to item 1 are privileged and need not be disclosed. They bear upon the mental

⁹ See *Ingalls*, note 7, *supra* at 48,104, 48,105; *Blackhawk Heating & Plumbing Co., Inc.*, VACAB No. 837 (August 21, 1969), 69-2 BCA par. 7847, at 36,475-76.

¹⁰ *Ingalls*, note 7, *supra*, at 48,100.

¹¹ *Allied Materials & Equipment Company, Inc.*, ASBCA No. 17318 (September 11, 1973), 73-2 BCA par. 10,338, at 48,805-806; *Ingalls*, note 7, *supra*, at 48,104-105.

¹² See Note, 86 Harv. L. Rev., note 4, *supra*, at 1057.

¹³ *Ingalls*, note 7, *supra*, at 48,100.

processes, deliberations, computations and methods by which the contracting officer arrived at his final decision.¹⁴ Their disclosure would constitute an invasion of the administrative reasoning process which traditionally has been protected.

The appellant asserts that these drafts are necessary in order to determine if the contracting officer rendered his own decision or arbitrarily followed the suggestions of others. From our examination of the file it appears that the contracting officer's decision was the product of his personal and independent judgment. Comparison with the drafts reveals that his decision is by no means a slavish duplication. Even if it were, however, a mere showing that the contracting officer adopted without change a decision prepared by a subordinate is not enough to warrant further inquiry into the question of whether he acted independently.¹⁵

Conclusion

The claim of privilege is upheld as to items 2, 5 and the draft of findings of fact and decision attached to item 1.

¹⁴ See *Distillery, Rectifying, Wine & Allied Workers International Union v. Miller*, 16 F.R. Serv. 2d 299 (W.D. Ky. 1972); *Shaffer Tool Works v. Joy Manufacturing Co.*, 14 F.R. Serv. 2d 1282 (S.D. Texas 1970). In *Allison & Haney*, note 6, *supra*, in refusing to make a draft of a findings of fact available, we said, at 33,686, "An appellant is not entitled to raid the Government's waste basket."

¹⁵ *J. A. Terteling & Sons, Inc. v. United States*, 182 Ct. Cl. 691, 694 (1968). See *Pacific Architects and Engineers Incorporated v. United States*, No. 298-72, Ct. Cl., January 23, 1974, at 16.

The claim of privilege is denied as to items 3, 4, 6, 7, 8 and 1 (except for the draft of findings of fact and decision attached thereto). The Government is hereby directed to make these documents available to the appellant for inspection and copying at a time to be arranged between counsel.

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

KIRKPATRICK OIL AND GAS COMPANY

15 IBLA 216

Decided April 9, 1974

Appeal from a decision of the Acting Director, Geological Survey, GS-52-O&G, refusing to approve a 640-acre communitization plan.

Affirmed.

Oil and Gas Leases: Generally—Oil and Gas Leases: Communitization Agreements

While the actions of a state, under its police powers, in establishing spacing units for oil and gas wells is a factor to be considered in determining the acceptability of a communitization agreement, the Department of the Interior reserves the final authority on approving communitization agreements affecting federal leases of oil and gas deposits.

Oil and Gas Leases: Communitization Agreements

April 9, 1974

Where evidence indicates that a producing well is an oil well, and that a single well under a 640-acre spacing agreement will not effectively recover available oil from the underlying pool, it is proper to refuse to approve a communitization agreement for such area.

Oil and Gas Leases: Communitization Agreements—Oil and Gas Leases: Royalties

In the absence of an approved communitization agreement involving a federal oil and gas lease, production of oil and gas from such federal lease is wholly attributable to that lease for computation of royalty due to the United States.

APPEARANCES: John R. Robertson, Jr., Esq., of George, Kenan, Robertson & Lindsey, Oklahoma City, Oklahoma, for appellant.

*OPINION BY
ADMINISTRATIVE
JUDGE HENRIQUES*

*INTERIOR BOARD OF
LAND APPEALS*

Kirkpatrick Oil and Gas Company has appealed from a decision of the Acting Director, Geological Survey, dated July 17, 1973, in which he affirmed the refusal by Regional Oil and Gas Supervisor, Tulsa, Oklahoma, to approve a 640-acre communitization agreement embracing Kirkpatrick's oil and gas lease NM 025111-A (Okla.).

Oil and gas lease NM 025111 (Okla.) issued on May 1, 1959, for a primary term of five years and so long thereafter as oil or gas was produced in paying quantities. By partial assignment lease NM 025111-A

(Okla.) was created, effective December 1, 1961. Oil and gas lease NM 025111-A consisted of 171.60 acres, described by metes and bounds, in sec. 3, T. 22 N., R. 14 W., I.M., Oklahoma. Upon proper application the lease was extended for an additional five years to April 30, 1969. Appellant acquired the lease by assignment effective February 1, 1969. By decision dated May 13, 1969, a partial assignment of the subject lease, aggregating 53.10 acres, more or less, was approved effective April 1, 1969. Both the new lease NM 025111-B (Okla.), and lease NM 025111-A (Okla.), were extended through March 31, 1971, pursuant to 43 CFR 3128.5(b) (*now* 43 3107.6-2). Lease NM 025111-A (Okla.) contained 98.71 acres, more or less.

On March 19, 1971, appellant completed a producing well, Hepner 1-3, with an initial production of 136 barrels of 39.1° gravity oil with 1,150 MCF of gas per day. This production was achieved from the Mississippi Lime formation at a depth of 7,110 to 7,750 feet. The resultant gas-oil ratio [GOR] was thus 8,450:1 in cubic feet of gas per barrel of oil. By letter of July 29, 1971, appellant submitted a proposed communitization agreement embracing all of section 3. By letter dated August 6, 1971, the Regional Oil and Gas Supervisor informed appellant that the proposed communitization agreement was unacceptable and returned unexecuted copies thereof. This rejection was premised on classification by the

Geological Survey of the subject well as an oil well, and a finding that 640-acre spacing for oil wells did not adequately protect the public interest. The decision also informed appellant that until an acceptable communitization plan was proposed, appellant would be obligated to pay full federal royalties on its production. Kirkpatrick appealed from this determination. By decision dated July 17, 1973, the Acting Director, Geological Survey, affirmed the decision of the Regional Oil and Gas Supervisor.

On appeal to this Board the appellant reiterates the arguments presented to the Acting Director, Geological Survey. Central to its contentions is the action of the State of Oklahoma Corporation Commission establishing a 640-acre spacing unit for section 3. On April 25, 1969, pursuant to a request of appellant, the Corporation Commission established 640-acre spacing for a number of formations in various sections within Ts. 22, 23 N., R. 14 W. This spacing was established because it was expected that natural gas would be the hydrocarbon encountered as the result of drilling a well, and that one well would adequately, economically and efficiently drain at least a drilling and spacing unit of 640 acres. Included in this order was the Mississippi formation in sec. 3, T. 22 N., R. 14 W., I.M., which embraced oil and gas lease NM 025111-A (Okla.).

Appellant, as a result of the Corporation Commission's action, is impaled on the horns of a dilemma,

and as a practical matter contends that it is required to pay double royalties. Under the Corporation Commission's order of April 25, 1969, it is obligated to prorate production from its well to all the acreage in section 3. Under the decision of the Acting Director, Geological Survey, however, appellant must pay full federal royalties on the production taken from the federal leasehold. Thus, appellant is in the position of owing to the federal government royalty of 1/8th of 8/8ths production, in addition to its royalty obligations to the other royalty owners within the state approved spacing unit.¹

This case presents an issue of first impression before the Department and the initial question that must be faced is the authority of the federal government to utilize its own criteria for the approval of a communitization agreement involving a federal oil and gas lease. The resolution of this question entails an analysis of the interplay between the federal government's paramount authority over its oil and gas deposits and the exercise of a state's

¹ Sec. 2(d) of the federal oil and gas lease provides:

"Royalty on production—To pay the lessor 12½ percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221)."

Appellant contends that its outstanding royalty obligation to the remaining royalty owners is 9.2549 percent. Thus its royalty obligations aggregate 21.75492 percent. We would also note that appellant contends that the actual acreage in the section is 641.444 acres. Inasmuch as the exact acreage in the section is immaterial to our disposition of this case, we make no finding on this contention.

police power for conservation purposes.

That Congress is possessed of the power to exercise exclusive control over federal property is clear from a reading of Article IV, section 3, clause 2, of the United States Constitution.² But it does not necessarily follow that Congress has preempted all state regulation of oil and gas deposits in federal lands. Particularly, in the area of state police power, it has been held that until such time as Congress has determined to deal exclusively with the subject, state law extends over the public domain. See *Colorado v. Toll*, 268 U.S. 228 (1925); *McKelvey v. United States*, 260 U.S. 353 (1922); *Omaechevarria v. Idaho*, 246 U.S. 343 (1918); *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 369 (D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969). *cert. denied*, 396 U.S. 829 (1969).

The applicable federal statute, section 17 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226(j) (1970), provides in relevant part, that:

[w]hen separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land com-

prising the drilling or spacing unit when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto.

The critical question is whether the above-quoted statute is indicative of a Congressional preemption of state regulation in the area of communitization or drilling agreements affecting federal leases. We believe that it is. We find support for this view in the opinion of District Judge Daugherty in *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, *supra*.

In that case, Texas Oil and Gas Corporation and John H. Hill, owners of federal oil and gas leases, sought to quiet title in lands under lease to them by seeking a declaration that a forced pooling order by the Oklahoma Corporation Commission was null and void, as applied to the federal lands. They argued, *inter alia*, that the federal government was vested with exclusive control over the federal lands. The court rejected any notion of a blanket preemption, but held that in two areas Congress had imposed "significant controls which must be satisfied before the State police power in the area of conservation may ultimately attach." *Id.* at 369. The first of these was that a federal mineral lessee could not assign his lease without the consent of the federal government, citing 30 U.S.C. § 187 (1970). The second condition is of direct bearing on the instant appeal, namely, that "a pooling or

² Article IV, sec. 3, clause 2, provides:

"Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *"

communitization agreement involving federal and non-federal lands must be approved by the Federal Government." *Id.* Though the Court refused to grant plaintiffs the requested relief, its decision was premised on the fact that:

* * * the evidence herein reveals without dispute that the *federal government* approved the transfer of the working interests involved herein to the Defendant by the forced pooling Order of the Oklahoma Corporation Commission and *approved the communitization of the leases in the spacing unit prescribed by the Oklahoma Corporation Commission.* Thus, these limited controls established by Congress have been fully satisfied in this case. (*Italics added.*) *Id.* at 369.

The difference between *Texas Oil and Gas Corp., supra*, and the instant case is precisely the fact that the federal government has *not* approved the communitization of the leases in the spacing unit prescribed by the Oklahoma Corporation Commission. We think it clear that the federal government is under no *obligation* to accede to spacing orders issued under a state's police powers for conservation purposes, when the responsible federal official feels that it would not be in the public interest. A subsidiary question, however, and one which appellant vigorously presses, is whether or not, given the facts of this case, failure to accept the state's 640-acre spacing order is an abuse of discretion.

In its appeal before the Acting Director, Geological Survey, and again before this Board, appellant advances three arguments:

1. The decision is based upon the false premise that the order of the Oklahoma

Corporation Commission creating the 640-acre drilling and spacing unit is in error and should be deleted, and that 80-acre drilling and spacing units should be established in place of such 640-acre unit.

2. The decision is based upon the false premise that a particular drilling and spacing unit established by the Corporation Commission of Oklahoma and existing by virtue of the laws of this state is against the public interest.

3. The decision requires Kirkpatrick to "serve two masters," one the State of Oklahoma, the second, the United States of America, without benefit of relief from either.

In support of its first argument Kirkpatrick points to a number of considerations. It argues, in effect, that the Original decision of the Oklahoma Corporation Commission was correct, that in the proceedings before it, undertaken pursuant to 52 O.S. § 87.1 (1971), the Corporation Commission considered a variety of factors before making its determination,³ among which were economic factors, that the Mississippi Lime was actually a secondary pro-

³ 52 O.S. § 87.1(b) (1971) declares that information on the following facts, among others, shall be material in the actions of the Corporation Commission in establishing a well-spacing unit:

"(1) The lands embraced in the actual or prospective common source of supply; (2) the plan of well spacing then being employed or contemplated in said source of supply; (3) the depth at which production from said common source of supply has been or is expected to be found; (4) the nature and character of the producing or prospective producing formation or formations; (5) any other available geological or scientific data pertaining to said actual or prospective source of supply which may be probative value to said Commission in determining the proper spacing and well drilling unit therefor, with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein."

April 9, 1974

ducing zone (the Hunton zone being the primary zone for Hepner 1-3) and that no primary well could be drilled, on an economic basis, for the purpose of developing the Mississippi Lime reservoir.

We feel, however, that, in a very real sense, the thrust of appellant's comments is misdirected. This Board is not passing on the reasonableness of the Corporation Commission's decision, but on that of the Acting Director, Geological Survey. Though it is obvious, we think it worthy of special notice that the decision of the Acting Director was, to a large extent, premised on information not available when the Corporation Commission established a 640-acre spacing unit, *viz.*, the result of actual production from Hepner 1-3. As was noted above, initial production showed a GOR of 8,450:1. Subsequent production indicates that the ratio has declined to a GOR between 6,000:1 and 7,000:1. The oil has a corrected gravity of 36.9° to 37.1° API.

There is no federal definition of what constitutes an oil well as opposed to a gas well. This lack of a ready-made formula does not, however, bar intelligent classification. In certain states there are statutory definitions. Thus, for example, Texas defines an oil well as "any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas." Tex. Rev. Civ. Stat. Ann. Art. 6008 §2 (e). On the opposite end of the spectrum, the Court of Appeals for

the Tenth Circuit has held that a well which produces "liquid hydrocarbons of 50° or higher gravity" is classified as a gas well in Oklahoma. *Diggs v. Cities Service Oil Co.*, 241 F.2d 425, 427 (10th Cir. 1957).

We are not disposed to establish any hard and fast rules as to what is or is not an oil well. Nevertheless, we are in agreement with the Geological Survey that the recorded production clearly indicates that Hepner 1-3 is an oil well and not a gas well.⁴ This being the case we reach a second question as to whether it is proper to reject a 640-acre communitization agreement for oil production.

This really is a question of whether one oil well can efficiently drain a 640-acre tract. There are no set rules as regards the proper spacing of oil wells. Nevertheless, we are of the opinion that a communitization agreement, embracing an entire section of 640 acres, would not adequately drain that area. Furthermore, Oklahoma law provides that the Corporation Commission "shall not establish well spacing units of more than eighty (80) acres in size covering common

⁴ We note that the GOR of offset wells indicate a much higher ratio of gas to oil than that found in sec. 3. Thus, in sec. 33, T. 23 N., R. 14 W., the GOR is 44,600:1, in sec. 34, T. 23 N., R. 14 W., the GOR is 61,000:1, and in sec. 4, T. 22 N., R. 14 W., the GOR is 67,900:1. The GOR of offset wells is amenable to a number of divergent interpretations. It could be argued that the comparative GOR indicates that the Hepner 1-3 is aberrational. Just as easily it could be contended that the Hepner 1-3 shows the limits of the gas deposit in the area. We are thus unable to give much weight to the GOR's of the offset wells.

sources of supply of oil the top of which lies less than 9,990 feet and more than 4,000 feet below the surface as determined by the original or discovery well in said common source of supply." 52 O.S. § 87.1(c) (1971). Implicit in this statute is a recognition that an oil pool cannot be adequately drained under spacing of more than 80 acres. The issue before this Board is not the question of what spacing would adequately recover the optimum quantity of oil, but rather whether a 640-acre spacing would be sufficient. We agree with the Acting Director that 640-acre spacing for the oil production shown in this case is inadequate for efficient recovery of maximum quantity of oil from the pool.

Appellant's second contention, though similar to its first argument, has a slightly different focus. It maintains that the Acting Director's decision is based upon a false premise that the 640-acre spacing unit is against the public interest. Appellant argues, in effect, that the only interest which the federal government is protecting is its own royalty interest and that "public interest" embraces more than simple income flow to the government.

The concept of public interest is both broad and ephemeral. We agree that it is not limited to economic return to the government. The difficulty with appellant's position, however, is that it misconceives the legitimate basis which motivated the Acting Director, Geological Survey. The decision

reached was based on the public interest in attaining optimal development of energy resources. Perceptions of optimum conditions may differ, but given the facts of this case, we agree with the Acting Director that a 640-acre communitization agreement would not further the goals of proper development and the prevention of waste.

Finally, appellant complains of the fact that it must serve two masters without benefit of relief from either. We have indicated above that we are not unmindful of appellant's difficulties. Nevertheless, we are constrained to point out that there is an avenue of relief which appellant has foreborne from utilizing. Section 87.1(a) of chapter 52 of Oklahoma Statutes (1971) provides, in relevant part:

* * * that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, reestablish, or reform well spacing and drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; * * *.

This section also provides a procedural mechanism for obtaining this relief.

Appellant points out the fact that it is not obligated to seek such relief. That may well be the case. But appellant can scarcely be heard to argue that its refusal to seek relief means that no relief is available, or that the United States must aban-

April 11, 1974

don its position to provide such relief.⁵

Appellant requests, in the alternative, that if this Board affirms the Acting Director's action in refusing to approve a 640-acre communitization agreement, that the communitization agreement be treated as executed from the date of first production until a despacing order can be obtained from the Oklahoma Corporation Commission. Inasmuch as we have held that the Acting Director properly refused to approve the 640-acre communitization agreement we can perceive no grounds upon which the requested relief could be granted. In the absence of an approved communitization agreement full royalty payment to the United States must be made in accordance with the terms of lease NM 025111 (Okla.). Appellant elected to pursue this appeal rather than seek a despacing order. The consequences of this choice must be borne by appellant.

Appellant has requested oral argument. As it is the opinion of this Board, in view of our conclusions, that oral argument would serve no useful purpose, and would merely

⁵ We are not unaware that decisions of the Oklahoma Supreme Court indicate that there must be a substantial change of conditions or knowledge of conditions in an area before the Corporation Commission can entertain an application to modify a spacing order. *Phillips Petroleum Co. v. Corporation Commission*, 482 P. 2d 607 (Okla. 1971); *Cameron v. Corporation Commission*, 414 P. 2d 266 (Okla. 1966). We are unaware of any decision, however, that would indicate that the information obtained since the completion of the well would be insufficient to allow the granting of a despacing application if the Commission were so disposed.

retard speedy disposition of this case, which appellant has requested, the same is hereby denied. 43 CFR 4.25.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

KAISER STEEL CORPORATION

3 IBMA 70

Decided April 11, 1974

Appeal by Kaiser Steel Corporation (Kaiser) from an Administrative Law Judge's initial decision dated November 14, 1973 (Docket No. DENV 73-139), dismissing an Application for Review of a Withdrawal Order filed pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Whether an area of a mine is being used as a main haulage or secondary road is a matter of fact to be determined by the

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

Administrative Law Judge and his finding that the area was being used as a main haulage road will not be disturbed when supported by a preponderance of the evidence.

APPEARANCES: W. J. Lindgren, Esq., for appellant, Kaiser Steel Corporation; William H. Woodland, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY THE BOARD

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The procedural and factual background of this case is adequately set forth in the Administrative Law Judge's decision.²

We have reviewed the record and considered the briefs of the parties. Kaiser's brief contains several contentions, all of which we consider to be without merit and too insubstantial to require recitation or discussion. In our opinion Kaiser has not demonstrated any reason why the findings and conclusions of the Judge should be disturbed. Therefore, we conclude that the decision of the Judge should be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision of the Administrative Law Judge, issued November 14, 1973, dismissing Kaiser Steel

Corporation's Application for Review IS HEREBY AFFIRMED.

C. E. ROGERS,
Chief Administrative Judge.

DAVID DOANE,
Administrative Judge.

DECISION

November 14, 1973

KAISER STEEL CORPORATION

Application for Review, Docket No. DENV 73-139, Sunnyside No. 1 Mine.

This proceeding was initiated by an application filed by Kaiser Steel Corporation under section 105(a) (1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815(a) (1), for review of an order of withdrawal based upon safety standards set forth in 30 CFR 75.1403-10(b).

An inspector of the Mining Enforcement and Safety Administration¹ (MESA), served a notice to provide safeguards upon the applicant on March 21, 1973, stating:

Trips of empty cars, an average of 13 cars to a trip, were being pushed from 16 left slope landing to 16 left car loading point, a distance of about one (1) mile.

Cars on main haulage roads shall not be pushed, except where necessary to push cars from side tracks located near the working section to the producing entries and rooms, where necessary to clear switches and sidetracks, and on the ap-

¹ The Mining Enforcement and Safety Administration has been substituted for the Bureau of Mines in all proceedings pending before the Office of Hearings and Appeals (38 F.R. 18696, July 10, 1973).

² The Judge's decision follows at 3 IBMA 170.

proach to cages, slopes, and surface inclines.

Thereafter, on May 1, 1973, he issued a notice charging Kaiser with a violation of 30 CFR 75.1403 for failure to provide the safeguards and on May 10, 1973, an order of withdrawal for failure to abate the alleged violation. The application for review is based upon the contention that the notice and order were erroneously issued. The issue in the case is whether the notice was properly issued and whether the time for abatement was reasonable.

A hearing on the application was held at Price, Utah, on July 11, 1973. MESA was represented by William Woodland, Esq., Office of the Solicitor, Department of the Interior, Salt Lake City, Utah. The applicant was represented by W. L. Lindgren, Esq., Oakland, California. The United Mine Workers of America, who filed an answer in opposition to the application for review, was not represented at the hearing.

Section 75.1403-10(b), Title 30, Code of Federal Regulations states:

Cars on main haulage roads should not be pushed, except where necessary to push cars from side tracks located near the working section to the producing entries and rooms, where necessary to clear switches and sidetracks, and on the approach to cages, slopes, and surface inclines.

Prior to the issuance of the order, the applicant pushed cars through what was designated as the 16 left section of its Sunnyside No. 1 mine at Sunnyside, Carbon County, Utah. The notice of violation charged that

this practice constituted a violation of 30 CFR 75.1403.² The applicant contends the 16 left section is secondary haulage and that the pushing of cars through the area is not proscribed by 75.1403-10(b). The validity of the order under review and the reasonableness of the time for abatement, therefore, turns on the question of whether the 16 left section is a main haulage road.

In the applicant's normal operation, 52 cars are drawn into the mine by electric locomotive from the portal to a point where the main haulage line intersects a slope, a distance of 7,250 feet. Thirteen cars at a time are then lowered by cable down the 10.2 percent incline of the slope for a distance of 7,350 feet to a point where the slope intersects the 16 left section. The thirteen empty cars are then pushed by electric locomotive through the section 6,530 feet to the loaderhead. When filled, the cars are pulled through the section. The applicant has operated in this fashion for many years, mining out the 11, 12 and 13 left sections. At the present time, it is mining an extension of the 16 left section and the 17 left section. Coal from both sections is emptied into the same hopper from which the cars are loaded.

The company has, for many years, pushed cars through the 16 left section without challenge by either Federal or State inspectors under

² Although the notice of violation and the order of withdrawal specified section 75.1403, it was apparent that the inspector intended 75.1403-10(b). The pleadings and the evidence were directed to an alleged violation of 75.1403-10(a).

regulations substantially the same as section 75.1403-10(b) (Exs. B, C). The Government has not questioned this method of operation.

The practice was first questioned by Federal Coal Mine Inspector John Franco. He obtained information from his superiors concerning the distinction between secondary and main haulage in July 1972 and discussed the matter with the applicant's Safety Director in about August 1972 (Tr. 112, 120). After inspections in December 1972 and January 1973, the inspector issued a Notice of Extension—To Provide Safeguards on April 16, 1973, which stated:

An investigation in regard to pushing trips in 16 left has been underway. Additional time was granted (Tr. 113).

The applicant did not change his method of operation in 16 left section. The May 1, 1973, Notice of Violation—Failure to Provide Safeguards was, therefore, issued allowing the operator until 8 a.m. on March 8, 1973, to abate. When the practice of pushing cars through the 16 left section was continued, the May 10, 1973, Order of Withdrawal was issued at 8 a.m. and was terminated at 10:50 a.m. on the same day when the operator brought in another locomotive and motor man so that the empty cars could be pulled into the section rather than pushed.

In September 1973 the Bureau of Mines amended its manual to include the following provision (Tr. 33, 114; Ex. G):

Main haulage roads are interpreted to be: (a) the road leading from the surface to the section of a one-section mine; (b) from the surface into a multisection mine, and including the roads leading to the various sections of the mine.

Exceptions to main haulage roads are sidetracks or branch lines of limited distance which are not ordinarily used for through traffic. Sidetracks, branch lines, etc., may or may not extend from any main haulage road. Therefore, a main haulage road, as referred to in Section 75.1403-10(b) is a roadway used for the transportation of personnel, equipment, materials, supplies and/or other articles taken into or out of a coal mine, or section of a coal mine, regardless of alternate methods used to transport coal from the working faces and regardless of the size of the mine. Any branch track leading to a nearby installation (pump, compressor, etc.), or leading to the face of a nearby entry, room, crosscut, or pillar place is considered as an exception to main haulage roads.

The inspector testified that his issuance of the notice to provide safeguards was based upon Bureau of Mines policy of which he was informed and which was followed by the manual release of September 1972 (Tr. 113, 114), and that he would not have issued the notice had he not had the Bureau's definition of main haulage (Tr. 126).

The definition of main haulage road that appears in the manual is a reasonable one. But, independent of that interpretation, I have no difficulty in concluding that a road over a mile in length, that in the past has serviced three working entries and presently services two working entries, cannot be considered other than a main haulage road.

April 11, 1974

Consider, for example, a mining operation under the exact conditions existing in the area of the 16 left section but with a portal at the beginning of that section. It could hardly be argued that the mine had no main haulage road. The fact that, in the applicant's operation, coal from different areas of the mine is subsequently transported on tracks along with coal from the 16 and 17 left sections would not convert what would normally be classified as main haulage to secondary haulage. The failure of the Government over a long period of time to enforce the requirements of the regulations related to the applicant's mine does not affect its validity.

I conclude that the notice was properly issued and that the time for abatement was reasonable.

DENT D. DALBY,
Administrative Law Judge.

ZEIGLER COAL COMPANY
(No. 9 MINE)

3 IBMA 78

Decided April 11, 1974

Zeigler Coal Company appeals an initial decision by an Administrative Law Judge (Judge) assessing civil monetary penalties for violations of the Federal Coal Mine Health and Safety Act of 1969 in Docket No. BARB 72-171-P.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

APPEARANCES: J. H. Woods, Esq., for appellant, Zeigler Coal Company; Mark M. Pierce, Esq., for appellee, Mining Enforcement and Safety Administration (MESA).

OPINION BY ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Zeigler Coal Company (Zeigler) appeals to the Board from an initial decision and order dated July 31, 1973, wherein penalties in a total amount of \$2,200 were assessed for ten violations of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ Seven of the ten notices of violation are challenged on appeal.

Issues Presented

I.

Whether four alleged violations were proved by a preponderance of the evidence.

II.

Whether, as to two alleged violations, air quantity measurements were taken in the proper locations within the mine.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. secs. 801-960 (1969).

III.

Whether, as to one alleged violation, water had been applied within 40 feet of the working face.

Discussion

I.

Zeigler contends that the following four Notices of Violation should have been vacated on the ground that the Federal inspectors who issued the Notices could not sufficiently recall or testify to the circumstances obtaining at the time the violations were alleged to have occurred:

Notice No. 1 FEB, 8/30/71, alleging a violation of 30 CFR 75.301 in that the velocity of air reaching the last open crosscut between Nos. 6 and 7 entries in the 10 south main west of the operator's mine was too low to be measured with an anemometer;

Notice No. 3 MEM, 9/13/71, alleging a violation of section 75.302-1(a) in that a line brattice or other approved device was not used when coal was being loaded on No. 1 unit No. 4 entry;

Notice No. 4 MEM, 9/13/71, alleging a violation of 75.301-1 in that the velocity of the air current reaching the face of No. 4 entry where coal was being loaded was not sufficient to obtain a measurement with an anemometer;

Notice No. 2 MEM, 9/15/71, alleging a violation of 75.301-1, in that the velocity of the air current reaching the face of No. 8 entry, where coal was being cut, was too low to be measured with an anemometer.

At the hearing, held on February 12, 1973, Inspector Fred E. Brown, Jr., who issued *Notice No. 1 FEB*, testified that he had no recollection of this violation other

than what he read from the Notice. He did state, however, that the vanes on the anemometer were not turning (Tr. 46). The lack of air velocity was corroborated by Mr. Millard Gaddis, Zeigler's safety engineer, who explained that a fan was malfunctioning. (Tr. 249.)

The recollection of Inspector Mitchell E. Mills, who issued the remaining three Notices was also vague. This inspector was able, however, to refresh his recollection by referring to notes he had made when the Notices were issued and served on representatives of the operator. With respect to *Notice Nos. 3 MEM, 9/13/71* and *4 MEM, 9/13/71* he recalled, upon referring to his notes, that he had spoken to two of the operator's employees about the failure to have a line brattice or other approved device in use while loading coal (Tr. 77-8, 89). As to *Notice No. 2 MEM, 9/15/71*, the inspector testified that he signed but did not write this Notice. He could not recall that he supervised the writing of this Notice or whether he personally observed the conditions described therein. However, Millard Gaddis, who accompanied the inspector on this inspection, corroborated the fact of lack of air at the face. He stated that a line curtain was hung within minutes after the Notice was issued and that thereafter an airflow of 10,000 cubic feet was measured at the face. (Tr. 255.)

Zeigler's argument, that the above four Notices are inadequate to prove the violations in view of the

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inspectors' poor recollection, is based on our holding in *Conn and Parker Coal Company*, 1 IBMA 128, CCH Employment Safety and Health Guide par. 15,376 (1972). In *Conn and Parker*, we stated that "the mere allegation contained in the Notice is not in our view sufficient to carry the Bureau's burden of proof by a preponderance of the evidence, that this 'violation' did occur." The Board's conclusion in that case, however, was qualified by the fact that there was evidence, unrebutted by the Bureau (now MESA) which tended to negate grounds for the issuance of a Notice. Since no such evidence has been adduced in the instant case, *Conn and Parker* is inapposite. Moreover, it does not appear that the Notices in the present case are deficient.² Accordingly, we find no error in the Judge's conclusion that the four violations in fact occurred and were proved by MEST by a preponderance of the evidence.

II.

The next two notices appealed by Zeigler are 1 MEM, 9/14/71, and 1 BMC, 9/30/71, both charging violations of 30 CFR 75.301 respectively, as follows:

The quantity of air reaching the last open crosscut between No. 1 and No. 2

² See, for example, *Armco Steel Corporation*, 2 IBMA 359, 80 I.D. 790, CCH Employment Safety and Health Guide par. 17,043 (1973), where the Board stated that " * * * a sufficiently specific notice of violation, with proper foundation, standing by itself, may constitute a prima facie case in some instances * * *."

room on No. 2 unit on 10 south was only 3,600 feet per minute;

The quantity of air reaching the last open crosscut on the intake side of the No. 1 unit, 8 north panel, was only 3,400 cubic feet per minute.

Zeigler does not dispute the low readings but contends that the air measurements were made in the wrong locations of the Mine under 30 CFR 75.301-3 which provides in pertinent part:

(a) When a single split of air is used the volume of air shall be measured at the last open crosscut in a pair or set of developing entries or the last open crosscut in any pair or set of rooms which shall be the last crosscut through the line of pillars that separates the intake and return air courses. When the split system of ventilation is used, the volume of air shall be measured in the last open crosscut through the line of pillars that separates the intake and return air courses of each split.

(b) The volume of air at the intake end of a pillar line ventilated by a single split of air, shall be measured in the intake entry furthest from the return air courses and immediately outby the first open crosscut outby the line of pillars being mined. When a split system of ventilation is used, the volume of air shall be measured inby the last intake air split point.

Zeigler's position is that the air measurements should have been made at the end of a series of developing rooms within the last open crosscut, rather than on the intake sides of the units where the measurements were in fact made.³

³ Zeigler illustrated its contention by means of sketches (Exhibits R-1 and R-3) showing the locations on the return sides of the units where, in its view, the air measurements should have been made.

We find no merit in Zeigler's argument. 30 CFR 75.301-3 does not specify the point at which "intake air" becomes "return air." The location at which air volume measurement is to be made is therefore subject to interpretation. At the time these two Notices were issued MESA's interpretation was that intake air became return air after it had passed the first working place in the section (Tr. 197-198).⁴ Zeigler does not allege that it lacked notice of MESA's interpretation, or that different readings would have resulted had the measurements been taken at other locations. In view of the absence of testimony as to whether moving the point of measurement would have made any difference in the readings obtained, we conclude that an adequate amount of air reached neither of the two areas. Accordingly, we find no error in the Judge's determination that these two violations in fact occurred.

III

Notice of Violation 4 MEM, 9/20/71, alleged a violation of 30 CFR 75.401 in that water had not been applied to the areas within 40 feet of the working faces of room Nos. 1 through 6 on No. 5 unit, 9 south.

30 CFR 75.401 provides as follows:

Where underground mining operations in active workings create or raise ex-

cessive amounts of dust, water or water with a wetting agent added to it, or other no less effective methods approved by the Secretary or his authorized representative, shall be used to abate such dust. In working places, particularly in distances less than 40 feet from the face, water, with or without a wetting agent, or other no less effective methods approved by the Secretary or his authorized representative, shall be applied to coal dust on the ribs, roof, and floor to reduce dispersibility and to minimize the explosion hazard.

The record shows that mining operations were taking place in the unit in question when this Notice was issued. The inspector testified that the 40-foot area was dry. Zeigler's safety inspector testified that water had not been applied (Tr. 259) but that some moisture was left from the blasting of coal.⁵ The Judge found on these facts that water had not been applied within 40 feet of the working face during coal extraction. Accordingly, he determined that a violation of section 75.401 had occurred.

Zeigler alleges that the Judge failed to take into account that water is constantly used during the cutting, shooting, drilling, and loading of coal. Zeigler admits, however, that its allegations respecting the constant use of water are not based on evidence of record. Such a showing, even if it had been made, would not of itself refute the testimony of two witnesses to the effect that the area within 40 feet of the working face was dry. We,

⁴ By Memorandum dated August 22, 1972, MESA changed its interpretation to coincide with that of appellant. The Judge concluded, and we agree, that this change does not render the prior interpretation invalid (Exhibit R-5).

⁵ During the blasting of coal, a negligible amount of water is released from so-called "dummies" which are utilized to confine the explosion (Tr. 122).

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therefore, find no error in the Judge's determination that this violation in fact occurred.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge IS AFFIRMED and Zeigler Coal Company pay the assessments therein specified on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

ESTATE OF THEODORE SHOCKTO
(DECEASED UNALLOTTED PRAIRIE BAND POTAWATOMI INDIAN)

2 IBIA 224

Decided April 12, 1974

Appeal from an Administrative Law Judge's decision denying petition for rehearing.

Reversed and remanded.

205.1.0 Indian Probate: Divorce:
Indian Custom: Generally

A divorce in accordance with Indian custom may be accomplished unilaterally by either of the parties to a marriage. The fact of a separation, plus an intention on the part of at least one of the parties

that the separation shall be permanent, established by competent evidence is sufficient to terminate a marriage.

An Indian custom divorce dissolves a ceremonial marriage as well as an Indian custom marriage.

Before an intention on the part of at least one of the parties that the separation shall be permanent can be inferred, the basis for it must be established by convincing evidence because public policy favors the continuity of the matrimonial relationship.

325.3.0 Indian Probate: Marriage:
Indian Custom: Generally

In the absence of controlling federal legislation or formal tribal action, marriages of Indians living in tribal relation may be contracted and dissolved in accordance with Indian custom.

390.1.0 Indian Probate: State Law:
Applicability: Generally

The Department is required to apply the laws of state in which the allotment is located in determining the heirs of deceased allottees.

381.0 Indian Probate: Secretary's Authority: Generally

The Secretary of the Interior in the absence of specific legislation, has exclusive jurisdiction to determine the heirs of an Indian who dies intestate before the expiration of the trust period of the decedent's land.

APPEARANCES: John E. Kruschke, Esq., for appellant, Mary Jane Shockto.

OPINION BY
ADMINISTRATIVE
JUDGE WILSON

INTERIOR BOARD OF
INDIAN APPEALS

This appeal filed by Mary Jane Shockto through her attorney, hereinafter referred to as appellant, is from an order denying petition for rehearing duly made and entered on January 11, 1973, by Administrative Law Judge Vernon J. Rausch.

Theodore Shockto, hereinafter referred to as the decedent, an unallotted Prairie Band Potawatomi Indian, died intestate December 5, 1970, a resident of the State of Wisconsin, possessed of inherited trust interests situated in the State of Kansas. A hearing was held and concluded by Administrative Law Judge Vernon J. Rausch on September 16, 1971. Thereafter, on January 11, 1973, an order determining the heirs of decedent was duly made and entered by the Judge. The appellant in said order was found not to be an heir.

The appellant on March 8, 1973, timely filed a petition for rehearing from the order of January 11, 1973, *supra*. Although not alleging any newly discovered evidence which would alter the findings of fact set forth in the decision of January 11, 1973, the appellant requested a rehearing on the ground that the Judge erred in finding that an Indian custom divorce existed between the decedent and appellant. The following assertions were made as basis therefor:

1. Although for many years prior to the death of Theodore Shockto, this petitioner, his wife by civil ceremony, had not resided with Theodore Shockto, she continued as his wife and to her knowledge her

husband did not at any time take on another wife by Indian custom, and she, the petitioner, considers herself to be the wife of Theodore Shockto, deceased, by virtue of their civil ceremony.

2. Although Margaret Thunder claims to be the wife of Theodore Shockto by Indian custom, they did not reside on the reservation, but did in fact reside in Monico, Oneida County, State of Wisconsin.

3. There was testimony in the hearing by this affiant [sic] to the effect that she and her husband had planned to move to Kansas shortly before his death, and she had seen and talked to him and been with him prior to his death which would eliminate a presumption that separation was permanent.

The Judge denied the petition on April 30, 1973 and affirmed his prior order of January 11, 1973, wherein, among other things, he had found:

(1) That the ceremonial marriage between the decedent and the appellant had been terminated by an Indian custom divorce, and

(2) That a valid Indian custom marriage existed between the decedent and Margaret Thunder notwithstanding the Act of August 15, 1953, Public Law 280, 67 Stat. 588, 28 U.S.C. § 1360 (1970), and

(3) That Margaret Thunder as the surviving spouse was entitled to an undivided one-half interest in the decedent's estate under the Kansas Laws of Intestate Succession.

It is from the foregoing decision of April 30, 1973, that the appeal herein has been taken.

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In support of her appeal, the appellant in effect contends:

(1) That no Indian custom divorce was accomplished between the appellant and decedent prior to the effective date of Public Law 280, *supra*.

(2) That no Indian custom marriage could have taken place subsequent to the passage of Public Law 280, *supra*, and

(3) That the appellant by virtue of Public Law 280, *supra*, was the surviving spouse of the decedent and entitled in such capacity to share in the decedent's trust estate.

There appears to be only two issues in this case which need resolving, viz:

(1) Was an Indian custom divorce accomplished between the decedent and appellant prior to August 15, 1953, the effective date of Public Law 280?

(2) Could an Indian custom marriage be accomplished subsequent to August 15, 1953, the effective date of Public Law 280?

An examination of the record clearly indicates the lack of evidence to substantiate an Indian custom divorce prior to the passage of Public Law 280. No clear intent on the part of the decedent to permanently separate from the appellant prior to August 15, 1953 appears in the record. On the contrary, from the testimony it appears that the intent on the part of the decedent to permanently separate from appellant took place after the effective date of Public Law 280.

The Board is not unmindful that a divorce by Indian custom may be accomplished by one of the parties to the marriage by the separation plus an intention on the part of at least one of the parties that the separation shall be permanent. *Estate of Hugh Sloat*, IA-74 (April 10, 1952). Moreover, this result is also accomplished even though the parties concerned had gone through the form of a ceremonial marriage. *Estate of Noah Bredell*, 53 I.D. 78 (1930).

However, before an intention on the part of at least one of the parties that the separation shall be permanent can be inferred, the basis for it must be established by convincing evidence, because considerations of public policy favor the continuity of the matrimonial relationship. *Estate of Sarah Bruner*, IA-2 (September 28, 1949).

There appears to be no question in the case at bar that an Indian custom divorce could have been accomplished between the decedent and appellant in the absence of special statutory authorization. However, such does not follow in this case because of an intervening statute [Public Law 280] which in essence required marriages among Indians in Wisconsin to be accomplished and terminated in accordance with state law subsequent to its passage on August 15, 1953.

The statute in question or in issue herein is the Act of August 15, 1953, 67 Stat. 588, codified in 28 U.S.C. § 1360 (1970), whereby Congress

vested in five states—California, Oregon, Minnesota, Nebraska, and Wisconsin and Alaska by later amendment—jurisdiction, civil and criminal, over Indians without any further required legislative action on the part of the respective states.

Only sections 4(b) and (c) of the Act appear relevant and applicable to the issues before this Board. The foregoing sections of the Act provide:

4(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

4(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

The Judge in his decision apparently takes the position that 4(b) of the Act quoted above reserves to the Department of the Interior exclusive jurisdiction in such matters, among which, includes the right to recognize Indian custom marriages and divorces for inheritance pur-

poses. Apparently the Judge is of the further opinion that under 4(c) of the Act recognition of Indian custom marriages and divorces is not inconsistent with the civil law of Wisconsin.

We are not wholly in agreement with the Judge in his conclusions. We agree fully that the right to adjudicate in probate proceedings rests with the Department of the Interior pursuant to the Act. We, however, do not agree that the Act in the adjudicatory process precludes the Department from applying state law relative to the issue of marriage or divorce. Application of state law in no way vests or attempts to vest jurisdiction in the state over such matters. It merely sets forth a standard or criteria to be applied in resolving questions of marriage and divorce. Furthermore, we do not agree with his conclusion that the recognition of Indian custom marriage and divorce are not inconsistent with the civil law of Wisconsin relative to domestic relations.

The legislative history of Public Law 280 appearing in Vol. 2 U.S.C., Congressional and Administrative News (83rd Congress, 1st Sess., 1953) indicates that the legislation had two coordinate aims: first, withdrawal of federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to federal laws applicable to Indians as such. We find nothing therein that would lead us to conclude that Indians were intended to be exempt

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from state laws regarding domestic relations.

The purpose of Public Law 280 is set forth quite clearly and succinctly in *Rincon Band of Mission Indians v. San Diego County*, 324 F. Supp. 371 (D.C. Calif. 1971) wherein the Court stated:

It appears that the purpose of Congress in passing Public Law 280 was to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs. * * *

Section 4(c) of the Act gives recognition to any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community, *provided such are not inconsistent with any applicable civil law of the state.* (Italics supplied.)

In the case at bar, giving recognition to Indian customs regarding divorces and marriages, subsequent to August 15, 1953, would be clearly inconsistent with the civil law of the State of Wisconsin. Accordingly, we must conclude that by virtue of section 4(c) of the Act that the purported Indian custom marriage between the decedent and Margaret Thunder Shockto cannot be recognized for inheritance of the decedent's trust property.

In view of the reasons hereinabove set forth, our answer to the two questions hereinabove posed, must be in the negative. Accordingly, the Board finds:

(1) That no Indian custom divorce was accomplished between the

decedent and appellant, both residents of Wisconsin, prior to the effective date of Public Law 280, and

(2) That by virtue of Public Law 280 the purported Indian custom marriage between decedent and Margaret Thunder Shockto, also a resident of Wisconsin, cannot be recognized, and

(3) That the appellant was the legal surviving wife of the decedent and therefore entitled to inherit in his estate in such capacity.

Accordingly, it follows that the decision of the Administrative Law Judge dated April 30, 1973, denying the appellant's petition for rehearing should be reversed and remanded to him for entering an order consistent with the views and findings set forth herein.

NOW, THEREFORE by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's decision of April 30, 1973, is hereby REVERSED and the matter is hereby REMANDED to the said Judge for the purpose of entering an order consistent with the findings herein.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

**APPEAL OF CARL W. OLSON
& SONS**

Order

IBCA-930-9-71

Decided *April 15, 1974*

**CERTIFIED—RETURN RECEIPT
REQUESTED.**

Contract No. 14-06-D-6662, Specifications No. DC-6703, Earthwork, Concrete Lining and Structures for San Luis Drain, Bureau of Reclamation.

Motion Granted in Part.

Rules of Practice: Appeals: Discovery—Rules of Practice: Witnesses

A contractor's request to the Board to initiate action pursuant to 5 U.S.C. § 304 (1970), to obtain an Order of a United States District Court directing the issuance of a subpoena to retired Government employees, who cannot therefore be compelled by the Board to testify, requiring their appearance for the taking of their depositions in an appeal, is denied where the contractor has not shown that it has exhausted other means of obtaining the testimony sought.

APPEARANCES: Mr. Richard W. Smith, Attorney at Law, Woods, Aitken, Smith, Greer, Overcash & Spangler, Lincoln, Nebraska, for appellant; Messrs. William A. Perry, Albert V. Witham, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY
ADMINISTRATIVE
JUDGE KIMBALL*

*INTERIOR BOARD OF
CONTRACT APPEALS*

The appellant has requested the Board (1) to institute appropriate action pursuant to 5 U.S.C. § 304 (1970), to obtain an order of the United States District Court, Denver, Colorado, directing the issuance of a subpoena to Messrs. Frank E. Rippon, Lloyd F. Weide, and David Weinberg, requiring them to appear for the taking of their depositions in this appeal, and (2) in the event that the depositions of Messrs. Rippon, Weide and Weinberg fail to provide certain information sought, to permit the taking of the deposition of Dr. Jack W. Hilf.

This is an appeal under a contract for construction of concrete-lined drains, unlined drain ditches and various concrete and pipe structures, and related earthwork. In a findings of fact and decision, dated July 26, 1971, the contracting officer determined that the appellant was entitled to an equitable adjustment of \$60,766.34. In its complaint appellant requests an equitable adjustment of \$1,756,999.

The appellant asserts that "[o]ne of the central issues is the nature of the Government's description of the project, the choice of the Government of its design criteria for the project, and the correlation of such design criteria with the underground exploration of the project site and other information available to the Government with respect to subsoil condition." The Board has previously authorized the taking of

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depositions of Government employees who were alleged to have been instrumental in the selection of the design features for the drain and particularly the design of the foundation for the lining protective drain and the concrete lining of the drain.

According to the appellant, the deponents examined thus far "have denied responsibility for the design decision that eliminated a continuous" 3-5-inch thick "gravel blanket up the side slopes under the concrete lining" and have also denied "knowledge of who may have" been responsible for such decision. As alleged in par. 3 of the appellant's moving affidavit, they "have surmised that such decision was made by either Mr. Lloyd F. Weide, Mr. Frank E. Rippon, Mr. H. K. Brickey (who is deceased), or possibly Dr. Jack W. Hilf, or some combination of them." We note the omission of Mr. Weinberg's name from the list, although his role as narrative specification writer is mentioned in the affidavit.

Since Messrs. Rippon, Weide and Weinberg have retired from Government service and the Board thus cannot compel their depositions to be taken, a subpoena is sought to require their attendance for this purpose. If their depositions "fail to discern who selected the design for the * * * foundationing and lining protective drain and who rejected from the design the gravel blanket under the concrete lining and up the side slopes and the reasons there-

for," the appellant requests that Dr. Hilf's deposition be authorized.

Department counsel has advised that it made available to the appellant, at the appellant's request, the addresses and telephone numbers of Messrs. Rippon, Weide and Weinberg, and "assumed" they would be "contacted." The appellant indicated it has not availed itself of this opportunity because it does not want "to simply interview them" or "talk to them informally," but wishes "to place the witnesses under oath at the time they are questioned."

Our lack of authority to compel the attendance of a prospective witness who is not subject to Board order¹ does not diminish a party's right to contact him to determine if he will appear for examination voluntarily. Our policy is to strongly encourage such endeavors in connection with applications for depositions, as we have previously pointed out:

Parties should avail themselves of the opportunities open to them through a voluntary exchange of information. Before coming to the Board for formal relief, all such informal avenues should be exhausted. * * *

In this case extensive discovery has already taken place. Before initiating another wave of discovery, contacts on an informal basis among

¹ We noted in an earlier proceeding in this appeal that the Board can order only those persons employed by or under the control of the parties to appear for examination. *Carl W. Olson & Sons Co.*, IBCA-930-9-71 (October 15, 1973), 73-2 BCA par. 10,269.

² *Iversen Construction Company*, IBCA-981-1-73 (May 1, 1973), 80 I.D. 299, 301, 73-1 BCA par. 10,019, at 47,027.

counsel and prospective witnesses should be utilized to determine if more formal inquiry might be useful.

The appellant here has not demonstrated that informal contact with Messrs. Rippon, Weide and Weinberg would be fruitless. Appellant's counsel has overly asserted that he does not want "to simply interview them" or to "talk to them informally," but that he wants them to testify under oath. There has been no showing that any or all of them would refuse to appear for examination under oath voluntarily.

Before requesting the Board to activate the rather cumbersome machinery of 5 U.S.C. § 304 (1970) to obtain a subpoena directing them to testify, the appellant should have first determined that they would refuse to appear except by virtue of compulsory process. The Board should not be called upon to initiate action under 5 U.S.C. § 304 (1970) until all other means of obtaining the testimony sought have been exhausted.

As for Dr. Hilf, we previously refused to permit his deposition to be taken on the ground that he is the Government's expert witness and as such is traditionally examinable only upon a showing of exceptional circumstances. We held that appellant's application to take his deposition was renewable, however, where necessary, respecting matters of his direct involvement.³

It appears from the appellant's

description of the testimony heretofore elicited that Dr. Hilf may be able to furnish the information the appellant is seeking, which has not been educible from the other witnesses examined. We, therefore, hold that upon the conditions hereinafter appearing, the appellant may take the deposition of Dr. Hilf for purposes of discovery only, limited to the following inquiry: whether he revised or approved the design for the San Luis Drain and the lining protective drain; whether he decided or participated in designing the foundation for the concrete lining and whether a gravel blanket under the side slopes should be eliminated from the design of the drain and the reasons for such decision.

The appellant, however, will not be permitted to take Dr. Hilf's deposition, as well as the depositions of Messrs. Rippon, Weide and Weinberg. According to Department counsel, as of March 4, 1974, depositions for discovery purposes by appellant have produced over 1600 pages of testimony and nearly 160 exhibits. Additional extensive examination would appear to be essentially duplicative in nature and oppressive.

Accordingly, the appellant must now make an election. It may examine Mr. Rippon, Mr. Weide, or Mr. Weinberg under oath on a voluntary basis, if possible, for discovery only, after having determined on an informal basis who is most likely to be able to furnish the information sought, or it may take

³ Carl W. Olson, note 1, *supra*, at 48,470.

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Dr. Hilf's deposition limited in scope as above. If voluntary testimony under oath cannot be obtained from Mr. Rippon, Mr. Weide, or Mr. Weinberg, and if Dr. Hilf is unable to furnish the specific information sought, at the request of the appellant, the Board will initiate action under 5 U.S.C. § 304 (1970) for the issuance of a subpoena to Mr. Rippon, Mr. Weide, or Mr. Weinberg directing the one appellant's counsel has selected to appear for the taking of his deposition. Appropriate arrangements are to be made between counsel.

Conclusion

Under the conditions set forth in the body of the Order:

(1) the request for issuance of a subpoena under 5 U.S.C. § 304 is denied;

(2) the request for the taking of Dr. Hilf's deposition is granted.

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

UNITED STATES FUEL COMPANY

3 IBMA 87

Decided April 15, 1974

Appeal by United States Fuel Company from a decision by an Administrative Law Judge in Docket No. DENV 73-107-P assessing penalties in the aggregate amount of \$1,365 for various vio-

lations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Procedure

An Administrative Law Judge was obliged to dismiss and remand to the Assessment Officer under 43 CFR 4.545(b), 37 F.R. 11462 (June 28, 1972), until its repeal on April 24, 1973, upon the actual failure of an operator to appear at a hearing but not upon the mailing or filing of a statement of intent not to appear.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Penalty Against Operator

An Administrative Law Judge is warranted in concluding that there is a lack of good faith in achieving rapid compliance where an operator waits two months after notification to abate a condition which could have been accomplished in approximately one hour.

APPEARANCES: Richard H. Nebeker, Esq., for appellant, United States Fuel Company; Eleanor S. Lewis, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY
ADMINISTRATIVE
JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

United States Fuel Company (hereinafter the operator) appeals from a default decision, dated August 23, 1973, rendered by an Administrative Law Judge (hereinafter the Judge) in a penalty pro-

ceeding pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.¹ Penalties were assessed in the aggregate amount of \$1,365. The pertinent questions raised on appeal concern: (1) the operator's alleged rights under the decision of the United States District Court for the District of Columbia in *National Independent Coal Operators Association v. Morton* (hereinafter *NICOA*)²; (2) the Judge's refusal to dismiss pursuant to 43 CFR 4.545(b), 37 F.R. 11462 (June 28, 1972)³; and (3) the Judge's treatment of the good faith criterion in assessing a penalty upon Notice 1 CET dated August 2, 1972. Other arguments have been put forward in the brief by the operator, but we deem them to be without merit and too insubstantial to require explicit analysis for the purpose of this decision.

Discussion

I.

With respect to the *NICOA* issue, we note that the district court in that case held invalid a proposed order of assessment which had become final by operation of law. 30 CFR 100.4(e).³ We have heretofore held that operators' arguments

claiming prejudice to substantial rights as a result of the Secretary's informal assessment procedures contained in 30 CFR part 100 must be rejected on the ground that penalty proceedings before Administrative Law Judges are de novo. See *Western Slope Carbon, Inc.*⁴ and *United States Fuel Company*.⁵ We, therefore, reaffirm our previously stated position and reject the operator's allegations of error based on the *NICOA* case.

II.

With respect to the operator's contention concerning its rights under 43 CFR 4.545(b), which was applicable only to penalty proceedings, some procedural background is in order. A hearing in this case was set for April 27, 1973, but the operator advised the Judge, by letter dated April 23, 1973, and received April 25, 1973, that it did not intend to appear at the scheduled hearing and that summary decision pursuant to 43 CFR 4.545(b) was expected. That regulation provided:

(b) Where an operator or miner failed to respond to such an order to show cause or *fails to appear at a hearing*, the Examiner shall order the proceedings summarily dismissed and remanded to the Assessment Officer, who shall enter the final proposed order of assessment as the final order of the Department and Institute collection procedures. (Italics added.)

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

² 357 F. Supp. 509 (D. D.C. 1973).

³ The judgment of the district court was reversed recently in *National Independent Coal Operators Association v. Morton*, Civil Action No. 73-1678, CCH Employment Safety and Health Guide par. 17,266 (D.C. Cir. 1974). *Contra, Morton v. Delta Mining, Inc. et al*, No. 73-1752 (3d Cir. 1974).

⁴ 2 IBMA 161, 80 I.D. 707, CCH Employment Safety and Health Guide par. 16,300 (1973).

⁵ 2 IBMA 315, 80 I.D. 739, CCH Employment Safety and Health Guide par. 16,954 (1973).

April 16, 1974

The operator urges that this rule applies to this case, despite its repeal by general amendment published in the *Federal Register* on April 24, 1973,⁶ because "service" by mail upon the Judge was had on April 23. In our opinion, the operator's letter is wholly irrelevant because the pertinent portions of the regulation quoted above required dismissal upon an *actual* failure to appear and not upon the mailing or filing of a statement of *intention* not to appear. We conclude therefore that the Judge did not err in refusing to dismiss pursuant to 43 CFR 4.545(b), as that rule existed prior to April 24, 1973.

III.

The third issue raised by the operator concerns the Judge's finding of an "extreme" lack of good faith in achieving rapid compliance related to Notice 1 CET which charged the operator with a violation of 30 CFR 75.1306. That regulation requires that explosives and detonators be kept in substantial containers with no metal exposed on the inside. The Judge found that metal bolts were protruding into the interior of a powder magazine, a condition which he determined to be a violation of that regulation. He concluded that there was an extreme lack of good faith in achieving rapid compliance because the operator waited almost two months before correcting a condition which could have been abated

in one hour. (Dec. 3.) On appeal, the operator argues that the Judge failed to take into account extensions of time to abate granted by federal inspectors. (Tr. 9.) Although the record indicates that the operator ultimately abated the condition, we are of the opinion that there was no error in the Judge's conclusion that good faith in achieving *rapid compliance* was not demonstrated. We believe that the extensions of time granted by various inspectors were properly disregarded by the Judge in this circumstance.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-entitled docket IS **AFFIRMED.**

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

ESSEX INTERNATIONAL, INC.

15 IBLA 232

Decided April 16, 1974

Appeal from a decision by the Arizona State Office, Bureau of Land Management, dismissing a protest against private exchange A 4591.

Affirmed in part; reversed in part.

Applications and Entries: Generally—
Exchanges of Land: Generally—Min-

⁶ 38 F.R. 10086-7.

ing Claims: Lands Subject to—Private Exchanges: Generally—Private Exchanges: Protests

By regulation the filing of a formal exchange application under the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), segregates the selected land from appropriation under the mining laws. A mining claim located on such land thereafter is void ab initio and affords no basis for a protest against the exchange.

Applications and Entries: Generally—Mining Claims: Generally—Mining Claims: Litigation—Mining Claims: Patent—Private Exchanges: Protests—Rules of Practice: Protests—Waiver

The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands.

Mining Claims: Generally—Mining Claims: Litigation—Mining Claims: Patent

A holder of a mining claim is not required to institute adverse proceedings pursuant to 30 U.S.C. §§ 29 and 30 (1970), where the notice of publication of a mineral patent application expressly excludes the area of the claim in conflict.

Exchanges of Land: Generally—Mining Claims: Determination of Validity—Mining Claims: Hearings—Private Exchanges: Generally

Land within a mining claim validated by a discovery before a conflicting private

exchange application is filed is not available for selection in exchange, but if the claim is not valid the land status is not affected. However, a mining claim cannot be declared invalid for a lack of a discovery without due notice to the claimant and opportunity for a hearing.

Exchanges of Land: Generally—Mineral Lands: Generally—Mineral Lands: Mineral Reservation—Mining Claims: Generally—Private Exchanges: Generally—Private Exchanges: Protests—Taylor Grazing Act: Generally

Land which might be mineral in character may be selected for a private exchange under section 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown.

Administrative Procedure: Administrative Procedure Act—Constitutional Law: Due Process—Exchanges of Land: Generally—Hearings—Rules of Practice: Protests

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department.

APPEARANCES: Leo N. Smith, Esq., of Verity and Smith, Tucson, Arizona, for appellant; Jerry L. Haggard, Esq., of Evans, Kitchel and Jenckes, of Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Essex International, Inc., has appealed from a decision dated January 2, 1973, by the Arizona State Office, Bureau of Land Management (BLM), dismissing its protest against the consummation of an exchange of lands between the United States and Phelps Dodge Corporation under section 8(b) of the Taylor Grazing Act of 1934, 48 Stat. 1272, *as amended*, 43 U.S.C. § 315g(b) (1970).

The issues raised by Essex's protest and appeal arise from the following factual background. In April 1967, Phelps Dodge filed mineral patent application A 828 for 23 contiguous lode mining claims including the Foothill Nos. 34 and 35 claims within T. 5 S., R. 26 E., G. & S.R.M., Arizona. Notice of the patent application was posted on the ground and was published in a local newspaper during the period from October 11 to December 6, 1967. No adverse claim was filed. Mineral survey 4632 covered the group of the lode claims and a final mineral certificate for the claims issued March 25, 1968, subject to verification of a discovery. No formal action was taken by the Bureau with respect to the mineral patent application, but apparently Phelps Dodge was informally advised that Bureau mineral examiners had concluded there was insufficient proof of a discovery

of a valuable mineral deposit to support issuance of a mineral patent.

On March 23, 1970, Phelps Dodge filed its application to exchange certain land it owned within the Sitgreaves National Forest for the selected land described as Tract 37, T. 5 S., R. 26 E., which covers land within its mineral patent application and mineral survey 4632. On October 21, 1970, the selected land was classified as suitable for the private exchange. Thereafter Phelps Dodge filed further information and documents as requested and an appraisal was made of the offered and selected lands. Notice of the proposed exchange was published in a local paper beginning on October 11, 1972. In response, on December 8, 1972, Essex protested the exchange, raising two primary objections: (1) that the selected land is mineral in character and not subject to exchange under the Taylor Grazing Act; and (2) that the exchange conflicts in part with two unpatented mining claims which it owns or has an interest in, namely, the Sandwash 2 and D&L claims. A copy of a private survey map included with its protest shows the Sandwash 2 overlapping the Foothill 35 claim, and the D&L overlapping the Foothill 34. Tract 37 is shown as covering only a portion of the two Foothill claims. The map shows each of Essex's claims to be in conflict with Tract 37 as to a small triangular area.

In dismissing Essex's protest, the Bureau indicated with respect to the

first objection that even if the selected land is mineral in character the land may still be exchanged provided the value of the public land does not exceed the value of the private land offered in the exchange. Regarding the second objection, the Bureau held, in effect, that Essex's claims constituted no bar to the exchange. Specifically, it held that the owners of the Sandwash 2 had failed to file an adverse claim during the period the mineral patent application was published and, therefore, had waived any rights to the area in conflict with the Foothill 35 claim pursuant to 30 U.S.C. §§ 29 and 30 (1970). Further, it held that the D&L claim was null and void ab initio as to the area in conflict with the exchange because it was located September 3, 1972, after a valid formal exchange application had been filed by Phelps Dodge, which segregated the land from mining location pursuant to 43 CFR 2091.2-3.

In reiterating that the private exchange application should be rejected, appellant contends that there has been no conclusive determination by the Bureau whether the selected land is mineral or nonmineral in character. It contends that the land is mineral in character, and that mineral land cannot legally be made the subject of a private exchange under section 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970). Further, it contends, in any event, it is not in the public interest to allow a private exchange applicant to acquire land known to be mineral. It next contends, that even if mineral land can

be acquired under the private exchange provisions of the Taylor Grazing Act, the exchange in this case cannot be permitted as the decision classifying the land for exchange was based on a determination that the land was nonmineral in character. It also contends that the area in Tract 37 encompassed within its conflicting unpatented lode mining claims cannot be included within the exchange as any rights Phelps Dodge may have acquired in its proceedings under Mineral Application No. A 828 have been abandoned and waived by a relinquishment and the filing of the exchange application.

Phelps Dodge answered contending basically that the selected land has not been determined to be mineral in character, but if it is, the exchange may still be consummated provided the land values are equal. It also contends that the Bureau's decision should be upheld for reasons similar to those stated in that decision and additional reasons.

Essex's protest has two main thrusts. First, it asserts rights in itself as to two small areas allegedly conflicting with the selected land. This raises the question whether Essex has shown that it has valid rights which could compel rejection of the exchange application, at least as to areas of conflict. The second thrust of its protest concerns the entire exchange. It asserts no rights adversely affected by the exchange as to most of the land, but makes general legal and policy arguments against the exchange.

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We turn first to the alleged conflicting interests. Essex has asserted it located the D&L claim on September 2, 1972. This date is after Phelps Dodge had filed its formal exchange application. The regulations of this Department provide that upon filing of a valid formal exchange application, the selected lands are segregated from appropriation, including appropriation under the mining laws. 43 CFR 2091.2-3, 2202.5. Essex points to section 7 of the Taylor Grazing Act, 48 Stat. 1272, *as amended*, 43 U.S.C. § 315f (1970), as precluding a classification of lands to bar mineral entry. That provision, however, was to permit the location of mineral entries without a prior classification of land as mineral in character. Here it was not the classification action which caused the segregation from mineral entry, but regulations providing for the segregative effect upon the filing of a valid formal exchange application. The exchange application is made under another provision, section 8 of the Taylor Grazing Act. The effect of the regulations is to close lands from mineral and other location once a valid formal exchange application is filed. The regulations are within the authority of the Secretary of the Interior and are binding. Thus, the D&L and any other mining claim located after the filing of the valid formal exchange application for an unrestricted patent is void ab initio. Mining locations for lands which are not available for location under the mining laws confer no rights on

the locator and may properly be declared void ab initio where the facts of the withdrawal or segregation of the land are shown on the records of this Department. *David W. Harper*, 74 I.D. 141 (1967); *Leo J. Kottas*, 73 I.D. 123 (1966). Therefore, Essex has no rights under the D&L claim which afford any basis for its protest against the exchange because of a conflict with that claim. The decision is affirmed to this extent.

As to the alleged conflict between the Sandwash 2 claim and the selected land, the Bureau decision and the contentions of the appellant and the appellee assume there is a small area of the Sandwash 2 claim overlapping Tract 37 within the Foothill 35 claim. We shall discuss *infra* why this assumption may not be correct. However, even if there were a conflict between the Sandwash 2 claim and the Foothill 35 claim listed in the mineral patent application and the publication notice, the Bureau erred in finding that a mining claimant's failure to adverse the mineral patent application following publication precludes his right to protest a private exchange application thereafter as to the same area of conflict.

Revised Statutes 2325 and 2326, 30 U.S.C. §§ 29 and 30 (1970), require an applicant for mineral patent to publish notice of the application for a period of 60 days. The holder of a conflicting claim must: (1) file his intention to adverse the claim with the proper Bureau office within the publication

period; (2) within 30 days therefrom initiate proceedings in a court of competent jurisdiction to determine the right of possession; and (3) prosecute the proceedings with reasonable diligence to final judgment. Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period amounts to a waiver of any rights to a claim as against the mineral patent applicant for a conflicting claim. The adverse claimant may not thereafter assert his own claim as a bar to the issuance of a mineral patent to the applicant, although he may protest to show that the patent applicant has not complied with the requirements for patent. *Chemi-Cote Perlite Corp. v. Bowen*, 72 I.D. 403, 406 (1965); *People v. District Court of El Paso County*, 190 Colo. 343, 35 P. 731 (1894). See also, *Dahl v. Rainheim*, 132 U.S. 260 (1889); *Gwillim v. Donnellan*, 115 U.S. 45 (1885). Likewise, where a court determination has been made, the adverse claimant cannot assert his claim as an objection to the issuance of a mineral patent if the applicant is the successful litigant in the court proceedings. *Ethelyndal McMullen*, 62 I.D. 395, 400 (1955); *Wight v. Dubois*, 21 F. 693, 694 (D. Colo. 1884); *Walsen v. Gaddis*, 118 Colo. 63, 194 P.2d 306 (1948). Cf. *Estate of Arthur C. W. Bowen*, 14 IBLA 201, 81 I.D. 30 (1974).

The failure to adverse or to adverse successfully a mineral patent application estops an adverse claimant from asserting his claim against the issuance of a patent under the

mining laws. The procedure pertains to mineral patent applications, and contemplates suits between rival mineral claimants to the same interests in the land. *Powell v. Ferguson*, 23 L.D. 173 (1896). Therefore, where a nonmineral claimant failed to adverse a mining claim, it was held that this did not bar an adjudication and determination by the Department of the Interior upon application of a nonmineral entryman as to the mineral or nonmineral character of the land. *Id.* Neither the Bureau nor Phelps Dodge has cited any authority, nor do we know of any authority for holding that the failure to adverse a mineral patent application constitutes a waiver of a conflicting claim or an estoppel against a patent to be issued under some authority other than the mining laws. If we suppose the exchange applicant were someone other than the mineral patent applicant and the mineral patent application were rejected, could the exchange applicant set up the conflicting mining claimant's failure to adverse the mineral patent application to preclude his assertion of rights against the exchange application? We think not. Likewise, we do not think it makes any difference here because the exchange applicant is also the mineral applicant. Therefore, to the extent the Bureau decision held that Essex is precluded from protesting against the private exchange by asserting rights to a conflicting claim because it failed to adverse Phelps Dodge's mining claims, the decision is reversed.

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The decision is also reversed on that point for an even more fundamental reason. Overlooked by the parties to the appeal and by the Bureau is the fact that in describing the Foothill 35 claim the published notice of the mineral patent application expressly excluded the area of the Sandwash 2 claim in conflict.¹ Because the Sandwash 2 claim was excluded, there was no conflict and no reason for its owner to bring an adverse proceeding against the mineral patent application. The provisions of 30 U.S.C. §§ 29 and 30 (1970), requiring adverse proceedings by conflicting claimants had no applicability as to the Sandwash 2 claim because the notice indicated there was no conflict with that claim.

A review of mineral survey 4632 clearly establishes that the Sandwash 2 claim was identified as a conflicting claim but the conflict was to be removed by excluding the area of the Sandwash 2 claim from the survey of the Foothill 35 claim. Although mineral survey 4632 of the claims in the Phelps Dodge patent application has been canceled, the field notes of that survey and plats have been used to delineate Tract 37, the selected lands in the exchange. The exchange application, as amended October 25, 1971, gives a metes and bounds description which coincides with the calls of the survey as to the area in question here. The field notes of the survey show that the surveyors excluded part of the

Foothill 35 claim from the survey, using the northern boundary of the unpatented Sandwash 2 claims as the southern boundary of Foothill 35, which is the same boundary for Tract 37 in that area.

While Essex contends there is a conflict between the Sandwash 2 claim and Tract 37, the only support for its contention is a copy of the private survey plat submitted with its protest. That plat purports to show a small area marked in blue overlapping Tract 37. The overlap is created by a line drawn apparently to show the northern boundary of the Sandwash 2 claim at variance with the mineral survey plat line and calls. There is no explanation for this variance. The field notes of the survey indicate the survey was run from monuments for the Sandwash 2 claim and the calls were made from such monuments and public survey quarter section corners. Essex has not filed a copy of the notice of location of the Sandwash 2 claim which would give the metes and bounds description of that unsurveyed claim, nor any other information to support a conflict. Without more substantiation that mineral survey 4632 and the boundaries of Tract 37 intrude upon the northern boundary of the Sandwash 2 claim, we cannot find there is such a conflict.

If there is no actual conflict between the Sandwash 2 claim and the private exchange, there is no basis for Essex's protest on the ground of a conflicting right. *Cf.* 43 CFR 3873.3. If, however, there is a con-

¹ The mineral final certificate also expressly excluded the Sandwash 2 claim.

flict, it would be essential to determine whether the Sandwash 2 claim is a valid claim before the exchange could be consummated as to the area in conflict. If a mining claim is validated by discovery before the land is segregated by an exchange application, the land is appropriated by the claim and is not available for selection in an exchange. *Harry Yukon*, A-80762 (August 23, 1967). A mineral location made prior to a withdrawal or segregation of the land but not validated by a discovery, however, is a nullity and does not affect the land status. *Id.* Nevertheless, such a mining claim cannot be declared invalid because of a lack of discovery without due notice to the claimant and an opportunity for a hearing. See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920).

In view of the rulings made above, Essex will be allowed 30 days from the date of this decision to submit to the Bureau's State Office, if it desires, proof to establish that there is actually a conflict between Tract 37 and the Sandwash 2 claim. Such proof would include the notice of location of the Sandwash 2 claim describing an area which is in conflict and proof tending to show that the surveyed area actually includes part of the Sandwash 2 claim. If Essex fails to substantiate its assertion that there is an actual conflict, there would be no basis for its protest based upon such a conflict and the dismissal of the protest on that ground will stand. If, however, Essex shows an actual conflict, or

the facts to establish the conflict cannot be resolved from official records and matters which can be established by official notice (see 43 CFR 4.24(b)), a hearing will be required to establish whether the conflicting Sandwash 2 claim is valid before the exchange can be consummated as to the area in conflict.²

We turn now to Essex's objections to the private exchange generally pertaining to legal and policy considerations for exchanging land which might be mineral in character. The land was classified as nonmineral in character in view of a field report of a Bureau mineral examiner dated July 22, 1970, which states:

* * * the information available indicates that either a halo of subeconomic minerals surrounds a proven ore body and extends into the subject lands, or that similar grade mineralization is present, but very deeply buried. In any event, the presence of valuable mineral deposits on the claims has not been shown. Neither can the presence of valuable mineral deposits be inferred, particularly if realistic economic criteria are applied to the known data.

Essex contends that drilling it has conducted on lands south of Tract 37 establishes the mineral character of the land. At most, information of such drilling might lend support to inferences concerning an extension of possible mineralization into

² This does not mean that a hearing would be necessary if the area of conflict is omitted from the exchange application with the applicant agreeing to the omission without requiring additional selected land so as to affect the valuation determination of the selected and offered lands.

Tract 37, but it fails by itself to establish that extraction of minerals within Tract 37 is economically feasible and the land has a practical value for mining purposes. Such evidence is essential to establish the mineral character of the land. *California v. Rodeffer*, 75 I.D. 176 (1968). See *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972).

Even if the land is deemed to be mineral in character, this is not a legal impediment to a private exchange of the selected land without a mineral reservation where a discovery has not been made. Many grants and dispositions of public land by express statutory language, or by administrative or judicial interpretation, are limited to non-mineral lands. We cannot accept Essex's contention that the private exchange provision in section 8(b) of the Taylor Grazing Act is so limited. The language and context of the Act suggests otherwise. By section 8(b), the Secretary is authorized "when public interests will be benefited thereby," to exchange for certain private lands "an equal value of surveyed grazing district land or of unreserved surveyed public land * * *." 43 U.S.C. § 315g (b) (1970). Section 8(c) of the Act pertaining to state exchanges differentiates between an exchange based upon equal value or of equal acreage by requiring that when an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals

to the United States. 43 U.S.C. § 315g(c) (1970). Section 8(d) of the Act applies both to state and private exchanges and provides in part:

* * * That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. * * *

43 U.S.C. § 315g(d) (1970). This provision leaves to the discretion of the Secretary whether to reserve minerals to the United States where the exchange is based on a value for value exchange rather than a state exchange based on equal acreage. *Dredge Corp. v. Husite Co.*, 78 Nev. 69, 369 P.2d 576, 684, cert. denied, 371 U.S. 821 (1962). This discretionary authority is unlike the situations where no reservations of minerals could be made in the absence of a specific statutory authorization which compelled distinctions between authority to dispose of mineral and nonmineral lands. The only restriction upon the Secretary's authority to exchange lands for private lands, other than the public interest requirement, is that the lands be of equal value. Cf. Associate Solicitor's Opinion, M-36436 (May 9, 1957).

Regulation 43 CFR 2430.5(g) provides:

Lands determined to be valuable for purposes other than public purposes may be determined to be suitable for exchange

if the acquisition of the offered lands, the disposition of the public lands, and the anticipated costs of consummating the exchange will not disrupt governmental operations.

See also 43 CFR 2430.6. The information tendered by Essex with its protest in no way vitiates the propriety of the Bureau's classification of the land as suitable for exchange. If upon re-examination of available information the Bureau should conclude that the selected land may be mineral in character, there is no necessity for Phelps Dodge to file a new application, as Essex contends. The segregative effect of the original application, as amended, stands. The classification may be amended to reflect the mineral character of the land and the value of the offered and selected lands reappraised to assure that the value of the selected land is not less than the offered land considering possible mineral values in the selected land.

Nothing that Essex has shown establishes that the exchange is not in the public interest, assuming that the land values are equal. An exchange to acquire land within the boundaries of a national forest is within the public interest criterion of the Taylor Grazing Act. *Elbert O. Jensen*, 60 I.D. 231 (1948). See also *LaRue v. Udall*, 324 F.2d 428, 435 n. 16 (D.C. Cir. 1963) (concurring opinion). Essex's protest based upon general legal and policy considerations is denied.

Essex has made a motion to have a hearing in this matter. We have indicated it is entitled to a hearing based upon alleged conflicting rights

only if it can establish there is a conflict between the Sandwash 2 claim and the selected land. We deny its request for a hearing based on its general protest against the exchange in view of our conclusions above. A protester against an exchange who has no legally cognizable conflicting right in selected lands has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds, when his protest is considered in accordance with the rules of this Department. *LaRue v. Udall*, *supra*.

Essex has also filed a motion to supplement the record with the court transcript from *Hawkins v. Phelps Dodge Corp.*, Civil No. 72-203-TUC, and *Essex International, Inc. v. Phelps Dodge*, Civil No. 72-204 TUC (D. Ariz., judgment for defendant filed January 24, 1973).³ We see no useful purpose the transcript could serve in connection with this appeal and, therefore, deny the request.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

³ The court action arose from suits by Essex and others filed in the United States District Court in Arizona, asking the court to declare Essex's interest in the land encompassed in its lode mining claims superior to Phelps Dodge's rights. Phelps Dodge filed a counterclaim and both parties requested preliminary injunctions. On January 24, 1973, the court issued a preliminary injunction, in part, granting Phelps Dodge's request for a preliminary injunction and barring Essex from entering upon the area in conflict. The injunction was ordered to continue in effect pending "final determination by the United States Department of Interior of both the defendant's mineral patent application A 828 and private exchange application A 4591."

(NEZ PERCE ALLOTTEE NO. 853, DECEASED)

April 17, 1974

the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this decision.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

ESTATE OF JOHN S. RAMSEY
(WAP TOSE NOTE)
(NEZ PERCE ALLOTTEE NO. 853,
DECEASED)

2 IBIA 237

Decided April 17, 1974

This is an appeal from a decision denying a petition for rehearing.

REVERSED and REMANDED.

425.28.0 Indian Probate: Wills: Testamentary Capacity: Generally

Where a will, rational on its face, is shown to have been executed in legal form, the law presumes testamentary capacity of the testator, that the will speaks his wishes, and in order to overcome such will, the evidence must be clear, cogent and convincing. At the time the will is executed the testator must have sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty.

425.28.0 Indian Probate: Wills: Testamentary Capacity: Generally

Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases.

APPEARANCES: Henry Felton, Esq., for appellant, Aaron (Allen) Ramsey, Norman L. Gissell, Esq., for appellee, Clara Ramsey Scott.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal from the decision of Administrative Law Judge, Robert C. Snashall, denying the petition of Aaron (Allen) Ramsey, for rehearing.

The decedent, John S. Ramsey, died testate on January 15, 1971. Surviving the decedent were certain heirs at law who would have taken interests in the estate had there been no last will and testament. They are, Benedict Ramsey, son $\frac{1}{4}$; Aaron Ramsey, son $\frac{1}{4}$; Clara Ramsey Scott, daughter, $\frac{1}{4}$; and Roy Orville Hayes, Jr., grandson $\frac{1}{4}$.

The matter of the purported last will and testament of John S. Ramsey, dated May 12, 1970, came on for hearing at Lapwai, Idaho, on October 29, 1971 and August 23, 1972. Subsequent to the hearing, the Judge issued on February 26, 1973 an Order approving the will and Decree of Distribution. The will de-

(NEZ PERCE ALLOTTEE NO. 853, DECEASED)

April 17, 1974

the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this decision.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

ESTATE OF JOHN S. RAMSEY
(WAP TOSE NOTE)
(NEZ PERCE ALLOTTEE NO. 853,
DECEASED)

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APPEARANCES: Henry Felton, Esq., for appellant, Aaron (Allen) Ramsey, Norman L. Gissell, Esq., for appellee, Clara Ramsey Scott.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

**INTERIOR BOARD OF
INDIAN APPEALS**

This is an appeal from the decision of Administrative Law Judge, Robert C. Snashall, denying the petition of Aaron (Allen) Ramsey, for rehearing.

The decedent, John S. Ramsey, died testate on January 15, 1971. Surviving the decedent were certain heirs at law who would have taken interests in the estate had there been no last will and testament. They are, Benedict Ramsey, son $\frac{1}{4}$; Aaron Ramsey, son $\frac{1}{4}$; Clara Ramsey Scott, daughter, $\frac{1}{4}$; and Roy Orville Hayes, Jr., grandson $\frac{1}{4}$.

The matter of the purported last will and testament of John S. Ramsey, dated May 12, 1970, came on for hearing at Lapwai, Idaho, on October 29, 1971 and August 23, 1972. Subsequent to the hearing, the Judge issued on February 26, 1973 an Order approving the will and Decree of Distribution. The will de-

vised and bequeathed certain of the decedent's trust property as follows:

CLAUSE 2 (to Ben Ramsey and Clara Ramsey Scott),

CLAUSE 3 (to Clara Ramsey Scott and Roy Hayes, Jr.),

CLAUSE 4 (to Jennifer Ramsey),

CLAUSE 6 (to Mazie Red Wolf Ramsey, Roy Hayes, Jr. and Darlene James),

CLAUSE 7 (to Aaron (Allen) Ramsey, decedent left nothing).

RESIDUAL (No residual. However, if decedent acquired anything in the future, it would go to Aaron (Allen) Ramsey).

Aaron (Allen) Ramsey petitioned for a rehearing. Petition for rehearing was denied on May 1, 1973. An appeal was timely filed June 29, 1973.

The basic contention of the appellant was that the decedent did not possess the requisite mentality to make a will on May 12, 1970, and could not and did not make the will.

Where a will, rational on its face, is shown to have been executed in legal form, the law presumes testamentary capacity of the testator, that the will speaks his wishes, and in order to overcome such will, the evidence must be clear, cogent and convincing.

At the time the will is executed the testator must have sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the object of his bounty. *In re Gwinn's Estate*, 219 P. 2d 591, 36 Wash. 2d 583 (1950); *Dean v. Jordan*, 79 P. 2d

331, 194 Wash. 661 (1938); *In re Torstensen's Estate*, 184 P. 2d 255, 28 Wash. 2d 837 (1947).

Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases. *In re Heazle's Estate*, 257 P. 2d 556, 558, 74 Idaho 72 (1953) * * *.

On May 12, 1970, the date decedent executed the will in question he was 82 years of age. He had had several strokes, the last of which left him paralyzed and an invalid. He had no use of his left side and had very limited movement of his right arm. He was not able to write. He was hard of hearing and could see out of one eye only to distinguish night from day or light from darkness. He had no control over his bowel functions nor could he feed himself. His last stroke left his speech impaired.

Dr. Vern Bauman, decedent's physician, testified at the hearing held on August 23, 1972, that by May 1970 while he was taking care of the decedent, he was pretty far gone mentally and could not understand the import of a will draft if it were read to him, because he had a chronic brain syndrome and because he was dying by degrees including the brain.

Decedent's son, Benedict Ramsey, testified that he took care of the decedent for a period prior to 1963 after which decedent's son, Aaron Ramsey began to care for him. He further testified that he saw his father at Tri-State Convalescent

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Center several times during 1970. He testified that based upon his observations of his father over a period of time including 1970, he did not think that the decedent was competent to make a will on May 12, 1970.

Pertinent portions of the testimony of Dr. Bauman and Benedict Ramsey taken from the transcript of the hearing held at Lapwai, Idaho, on August 23, 1972, are hereinafter set forth:

Judge Snashall. Doctor, let me ask you, would it be your statement that he probably couldn't draft something like that, [Will], is that correct?

A. No way, no way.

Q. But, now what would be your opinion if somebody else drafted it and read it to him, do you think he could understand what they were saying to him?

A. Again, I feel that he probably could not 'cause he has had considerable advance degeneration. He had a chronic brain syndrome, which is a (unintelligible) of the brain, and he was dying literally by small area including the brain. (Tr. 91.)

* * * * *

Q. O.K. I understand that's difficult. But they were able to gather that from him apparently?

A. * * * This patient is an invalid, actually blind from arteriosclerotic degeneration, can't see from the left side * * *. (Tr. 92.) * * *

Q. You believe from a medical standpoint that he couldn't adequately identify his symptoms to you, is that * * *.

A. That's correct, because he had a stroke and * * *. (Tr. 93.) * * *

Q. He was able to recognize his relatives. Do you think he had the capacity to discern between a brother and sister?

A. He got pretty far gone when I saw him in May and July (1970). He was just * * * couldn't help himself couldn't

feed himself, had to be fed. It was a shame to keep him alive. We just gave him symptomatic care.

Q. You did see him on the 12th of May 1972 (meaning 1970)?

A. May 6th, July 15, August 5, September 3rd and October 6th. (Tr. 94.) * * *

Q. Dr. Bauman, you stated a moment ago that by May when you were examining him, he was pretty far gone. You were speaking of physical capabilities, were you not?

A. Physically and mentally, the more I reread my notes here. I remember the gentleman that he was well beyond being alive, I still don't know why he was hanging on. (Tr. 95.) * * *

Q. Would it be a possibility, now I'm asking this strictly as a possibility, would it be a possibility that when you examined him at that time that with the normal reticence, if I may use that word, on the part of an Indian person plus the fact of mere advanced age that he may have been competent but was refusing to answer or talk to you?

A. I did not sense this. He would mumble and of course, his stroke affected his speech. (Tr. 96.)

Pertinent portions of Benedict Ramsey's testimony taken from the transcript of the August 23, 1972 hearing are hereinafter set forth:

Q. Did you try to talk to him?

A. Yes I did.

Q. Were you able to do so?

A. Well, it didn't seem like to reach him.

Q. And did he know you?

A. Well, after I told him who I was, then he knew me.

Q. Was that sometime after you come into the room?

A. That is right. (Tr. 57.)

* * * * *

Q. Now you have known your father over many years, have you not?

A. Yes. * * *

Q. Now then, you saw your father in May of 1970, didn't you?

A. Oh, Yes. * * *

Q. Have you an opinion whether or not he was competent to make a will?

A. I don't really think so. (Tr. 59.) * * *

Q. What did you observe about your father when you went there. Just tell the Examiner what you observed about your father when you went in there to visit.

A. Well, he was just laying there, that's all, that's what I observed. * * *

Q. * * * you talked to your father, right?

A. I tried to, yeah.

Q. In the retirement home? Tri-State?

A. Yeah, I seen him. Whenever I come from Seattle, I used to visit him.

Q. All right. Now I'm talking specifically about your statement that you visited him sometime in May 1970. Now I want to know, at that time, when you talked to him did he answer your questions.

A. Well, I talked to him, but I mean, you know, he talked to a guy that he was, he was floating around in his bed. That's what he was talking to me about. You know, the kind of guy that was * * * he's sees things on the walls and everything else.

Q. Is that what he told you or what * * * the statements that he made?

A. That's what he said, that's what he said.

Q. All right, what specifically did he say when you were there?

A. Well, he said he was getting on his bed and they are going to go someplace, you know, to go, you know * * *. (Tr. 60, 61.) * * *

Q. O.K. Did you go through this routine with him when he saw stuff on the walls and what not everytime you went to see him?

A. Well, he was that way all the time. * * *

* * *

Q. You were then concerned with his mental sanity at that time?

A. Well, when he sees things on the wall, you know darn well he * * * you know what to think of the guy. * * * (Tr. 64.)

Q. He didn't talk to you after that?

A. Well, he talked about what he was doing, you know I mean, he wasn't talking, just generally talking, you know, like him and his bed was going to fly out of there. * * * (Tr. 65.)

* * *

Q. It's your statement then that as far as your concerned, your father was incapable of making a will * * *.

A. Ever since, ever since '59, he could * * * he couldn't do nothing for himself, period.

Q. I'm not talking about his physical problems now, I'm talking about his mental * * *.

A. You know, his mentality would run away from himself. (Tr. 68)

Great weight is given to the testimony of Dr. Bauman because he was a physician and because he was decedent's physician from 1969 until decedent's death.

Much weight is given to the testimony of Benedict Ramsey because he took care of his father for a period of time prior to 1970 and because he visited him at the convalescent home on occasions in 1970 and was able to observe him. In addition Benedict Ramsey stood much to lose in the event the 1970 will was declared invalid. In other words his testimony was against his own interest.

The testimony of Twila Williams, registered nurse at Tri-State Convalescent Center, and Mildred W. Rowley, practical nurse Tri-State, is given weight only insofar as they witnessed the placing of decedent's thumb print on the May 12, will.

Because of the discrepancies in the testimony of Clara Ramsey Scott and the testimony and Memorandum of May 12, 1970, of Regina

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Parot, weight is given to the testimony of Regina Parot only insofar as she was the scrivener who drafted the will. Little or no weight is given to the testimony of Clara Ramsey Scott.

Portions of the testimony of Regina Parot, Clara Ramsey Scott and Mildred Rowley, are set forth below.

Pertinent portions of Regina Parot's testimony taken from the transcript of the hearing held on August 23, 1972, are hereinafter set forth.

Q. May I ask, did John Ramsey speak the English language? (Tr. 4.)

A. Yes he did.

Q. Did he read and write the English language?

A. Yes, he could read. He had to hold the paper close but he could read and he could write.

Q. And it's your understanding then that he fully understood what was stated in that document?

A. Absolutely. *** (Tr. 5.)

Q. Did you know him prior to this time?

A. No I did not.

Q. How long did you talk to him before the will was prepared?

A. Oh, I talked to him probably fifteen minutes before I prepared the will.

Q. All right. Now subsequent to the preparation of that will, or was it prior . . . this memorandum, the copy of which you have in your hand, I'm handing you what purports to be the original and ask you if that's an original of your memorandum of May 12, 1970?

A. Yes it is. *** (Tr. 6.)

Q. Did you do this in contemplation of the information as to the execution of this will maybe necessary in the future?

A. Yes I did.

Q. Does the information contained in this document, in your opinion, exactly

the circumstances as that occurred at the time of the execution of this document?

A. Yes.

Q. And this document then was prepared merely as a living record of that happening, is that correct?

A. That's right. (Tr. 7.) ***

(A memorandum dated May 12, 1970 and addressed to Whom it May Concern, was introduced into evidence as Examiner's Exhibit #2 at the August 23, 1972 hearing). In the memorandum, Mrs. Parot stated among other things that she went to the Tri-State Convalescent Center on the morning of May 12, 1970, to prepare the will of John Ramsey at the request of Thomas St. Clair, Superintendent, Northern Idaho Indian Agency. She further stated that she met Clara Ramsey Scott in John Ramsey's room when she arrived; that Clara introduced Mrs. Parot to her father; that Clara asked her father several questions; and that Mrs. Parot then excused Clara from the room. (Tr. 8.)

On further examination Regina Parot testified as follows:

Q. All right. Now then, will you hand me the paper in your hand? Now then I want you to tell me what you found when you went into the room of John Ramsey and the . . . it was over at the place near the hospital Mrs. Parot, you said that John Ramsey could read and write the day that you were there?

A. Yes.

Q. And did he read the will?

A. He did not read it himself, no.

Q. Who read it?

A. I read him the will.

Q. Now then, you said he could write?

A. To my knowledge, he could write.

Q. And that he could read and write?

A. As far as I know, I didn't test him for whether or not he could write for very long. * * *

Q. And he was paralyzed except for the, some movement, a slight movement of the right arm?

A. That I didn't know.

Q. And he was blind, wasn't he?

A. No, I don't think he was blind.

Q. Did you observe him?

A. Yes I did.

Q. And how much talking did he do?

A. He did enough talking . . .

Q. Now isn't it a fact only answer yes or no?

A. No it is not a fact.

Q. But he could see him?

A. Yes.

Q. He could see the will?

A. He could see, I had the paper in my hand and he did look at it.

Q. And he had a previous, and you drew this from previous wills, didn't you? I mean you got the description?

A. I * * * No, I took the descriptions with me. I make it a point that before I make a will, if I know who the person is * * *.

Q. I didn't ask you what you make a point of, I asked you what you did that day.

A. I took the description with me.

Q. And where did you get the description?

A. From my legal records here and the branch of realities.

Q. The will appears to have the descriptions of the same order they are in the will of '65. Can you explain that?

A. Only for the fact that we were trying to keep it as close to the last one as we could * * *. (Tr. 10-12.)

* * * * *

Q. All right, he could write couldn't he?

A. As far as I knew he could write.

Q. All right, then why didn't you have him sign the will?

A. We asked him to sign it. I asked him if he wanted to sign it or put his thumbprint and he said his thumbprint would be easier for him. (Tr. 14.)

(NOTE: Decedent executed a previous will dated June 3, 1965 by putting his thumbprint on the document).

The pertinent portions of Clara Ramsey Scott's testimony taken from the transcript of the hearing held on August 23, 1972 are hereinafter set forth:

Q. And isn't it a fact that you asked Mrs. Parot to go over there and draw a will for your father?

A. No. (Tr. 79.) * * *

Q. And weren't you there at the time that she was over . . .

A. No I wasn't.

Q. You weren't over at the convalescent home?

A. I was over there but I was in the car because . . .

Q. Whose car?

A. In my car. I went over in the morning and I was sitting there when I seen Mrs. Parot and then, so I backed off * * *.

Q. Just a moment. Just answer my question. Did you know that Mrs. Parot was there to draw a will for your father?

A. No. (Tr. 80.)

Pertinent portions of the testimony of Mildred Rowley, a practical nurse at Tri-State Convalescent Home, taken from the transcript of the hearing held on August 23, 1972 are hereinafter set forth:

Q. Now I don't want you to give a medical opinion and I'll not ask you for them but wasn't Mr. Ramsey a little hard of hearing, just a little?

A. I don't know whether he was hard of hearing or just wouldn't answer. Sometimes we would have to ask him a couple of times, maybe three times before he would answer.

Q. And then would he answer just yes or no or would he go into a long * * *

A. No, no, John would say yes or no.

Q. Just yes or no? That's all he ever answered?

(NEZ PERCE ALLOTTEE NO. 853, DECEASED)

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A. I never did have a conversation with Mr. Ramsey. (Tr. 29.) ***

* * * * *

Q. Now his eyes. Could he see things?

A. I don't think so. Now he may have been able to see shadows when he first went to the nursing home and he would move his head when we would be around but then later on it seemed that he may not have seen anything.

Q. At the time of making this will, did you ever see him read anything?

A. I did not.

Q. Now when the time came for the pressing of his thumbprint, what happened? (Tr. 32.) ***

A. It has been so long ago but as far as I can remember, John raised his hand a bit, the lady put the pad there and sort of guided his hand to the pad for the ink and then she had the paper here and she guided his hand over to the proper place.

Q. She took hold of his hand and put it in the proper place?

A. Yes, she * * * otherwise his hand would not go to the proper place. (Tr. 33.) ***

The testimony of Aaron Ramsey is given weight only insofar as he took care of the decedent from 1963 up to the time the decedent was placed in the convalescent home in 1970.

To recapitulate, the testimony of Dr. Bauman was given great weight because he was John Ramsey's physician from 1969 to the date of his death; and was a disinterested party who observed the decedent on numerous occasions. Great weight is also given to the testimony of Benedict Ramsey, decedent's son, because John Ramsey resided with Benedict for a period prior to 1963; because Benedict had many opportunities to observe decedent at home, in the hospital and at the convalescent

home; and because his testimony at the hearing was against his own interest.

The testimony of Regina Parot was given weight only insofar as she was the scrivener who drafted the will because of the discrepancies in her testimony and the testimony of Clara Scott.

For example, Regina Parot testified through a memorandum she had prepared on May 12, 1970, admitted into evidence at the hearing of August 23, 1972, that she was requested by Thomas H. St. Clair, Superintendent, North Idaho Indian Agency, to draft a will for John Ramsey, that on the morning of May 12, 1970, when she entered John Ramsey's room, Clara Scott was there; that Clara introduced Mrs. Parot to John Ramsey, after which Clara left the room.

Clara Ramsey testified repeatedly that she was not at the hospital; that she was not present in the room when Mrs. Parot arrived on May 12, 1970, to draft John Ramsey's will, nor did she know that John Ramsey was having a will drafted. She further testified that she, Clara, was sitting outside the hospital on May 12, 1970, and when she saw Mrs. Parot arrive she backed off.

Regina Parot testified that she had never seen John Ramsey before May 12, 1970. She further testified that John Ramsey could read, write and speak the English language. Yet upon further questioning she testified that John Ramsey neither read nor wrote in her presence. Although John Ramsey was para-

lyzed, she testified that she did not know that he was paralyzed.

To further confuse the testimony of Mrs. Parot, Mildred Rowley, a practical nurse who had taken care of and witnessed the will of John Ramsey on May 12, 1970, testified that John Ramsey on May 12, 1970, could not see and could answer only yes or no to questions relating to his needs. Mildred Rowley further testified that she never conversed with John Ramsey, nor did she ever see him read or write.

After full and careful consideration of the record including the transcript of the hearing held on August 23, 1972, we find that the testator did not have sufficient mind and memory to understand the transaction in which he was engaged on May 12, 1970, to comprehend generally the nature and extent of the property which constituted his estate and of which he was contemplating disposition, and to recollect the objects of his bounty.

We further find that sufficiently clear, cogent and convincing proof exists to overturn the May 12, 1970 will and that it should be disapproved.

NOW, THEREFORE, by virtue of authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is hereby Ordered:

1. That the part of the Administrative Law Judge's order approving the testator's Last Will and Testament dated May 12, 1970, IS REVERSED and the will declared INVALID.

2. That the matter herein is RE-MANDED to the Administrative Law Judge for the purpose, after the parties in interest have been duly notified, of determining the validity of the decedent's Last Will and Testament executed June 3, 1965 and entering an order accordingly. This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

NORTH AMERICAN COAL CORPORATION

3 IBMA 93

Decided April 17, 1974

Appeal by North American Coal Corporation from a decision of an Administrative Law Judge, in Docket Nos. DENV 73-3-P, 73-32-P, 73-39-P, and 73-40-P, wherein penalties in the aggregate amount of \$13,541 were assessed for alleged violations of the Federal Coal Mine Health and Safety Act of 1969.

Modified and remanded.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Where an inspector states that "within a good degree of certainty" he saw coal being cut, mined, or loaded at a face or in a section, there is sufficient evidence to support the finding that the area involved was operational. That finding is

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a condition precedent to the ultimate conclusion that a violation of section 303(c)(1) of the Act has occurred.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of section 302(a) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Where a notice of violation of section 304(a) of the Act shows no indication of the depth or extent of an accumulation of combustible material, and the inspector has no present recollection of the condition which gave rise to such notice, the evidence is insufficient to constitute a prima facie case.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Incombustible Content

A properly taken floor sample, without samples from the roof and ribs, may alone support a finding that a violation of section 304(d) of the Act has occurred.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Protective Equipment

An operator complies with 30 CFR 75.1720(a) if it has a system designed to assure that miners wear protective safety goggles on appropriate occasions, and if such system in fact is enforced with due diligence. Where the failure to wear protective glasses is entirely the result of the employee's negligence rather than the result of the failure of the operator to require the wearing of such glasses, a violation of such safety standard has not occurred.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program

Where a computer printout does not show a potential "dump" sample was voided and the record contains no evidence to show that normal laboratory procedures prescribed by the regulations were not followed, or that the sample had been "dumped," an Administrative Law Judge errs by voiding the sample in determining whether a violation of 30 CFR 75.100(a) has occurred.

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Decisions

It is error for an Administrative Law Judge to find that a condition cited in a notice of violation was "serious," without identifying the potential hazard and the probability of its occurrence, and to find an operator "negligent" without indicating the source of the inference or the act or acts of commission or omission.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

An Administrative Law Judge may admit and give weight to evidence of economic losses suffered as a result of a vacated withdrawal order, as a general mitigating factor, in fixing the amount of the penalty warranted because of a violation arising out of a condition or practice cited in such order. However, an operator has no legal right to a strict dollar-for-dollar offset in such circumstances.

APPEARANCES: John A. Macleod, Esq., for appellant, North American Coal Corporation; J. Philip Smith, Esq., Assistant Solicitor, William H. Woodland, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

North American Coal Corporation (North American) appeals to the Board from a decision of an Administrative Law Judge (Judge) assessing penalties in the aggregate amount of \$13,541 for various alleged violations of the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ North American challenges some of the findings of violation, seeks reduction of some assessments allegedly computed by erroneous application of at least one of the six enumerated statutory criteria, and contends that the refusal of the Judge "to recognize * * * economic losses resulting from wrongful withdrawal orders in determining the amount of the penalties * * *" was error.² After careful study of the extensive record in this case, we have decided to modify the decision below and remand the case for the reasons hereinafter set forth in detail.

I.

Procedural Background

This case comes to the Board as an appeal from a decision made with respect to approximately ninety alleged violations in four dockets: DENV 73-3-P, 73-32-P, 73-39-P, and 73-40-P. The petitions for hearing and formal adjudication were

filed pursuant to 43 CFR 4.540, 37 F.R. 11461 (June 28, 1972), on July 17, 1972, July 24, 1972, and August 4, 1972, respectively. Each of the dockets concerned violations alleged to have occurred at North American's Kenilworth Mine which is located in Carbon County, Utah.

The dockets were consolidated for hearing which took place between January 9 and January 12, 1973, in Salt Lake City, Utah. The Judge issued his decision on April 27, 1973, and a timely Notice of Appeal was filed on May 16, 1973. After several extensions of time, North American's fifty-five page brief was filed on July 25, 1973, along with a motion to waive the limitation upon length of appellant's brief contained in 43 CFR 4.601(d) and a request for oral argument. After an extension of time, the brief of the Mining Enforcement and Safety Administration (MESA) was timely filed on September 4, 1973.

On November 15, 1973, the Board granted the motion to waive the limitation of brief for good cause shown and set the case for oral argument on December 12, 1973, confined to the question of whether the Judge correctly refused to consider North American's economic losses, sustained as a result of allegedly "wrongful withdrawal orders," in assessing penalties.

II.

Issues on Appeal

A. Whether the Administrative Law Judge erred in determining

¹P.L. 81-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

²Br. of Appellant, p. 4.

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that various violations of mandatory health or safety standards occurred.

B. Whether the Administrative Law Judge properly applied one or more of the six mandatory criteria in assessing various penalties.

C. Whether the Administrative Law Judge erred in failing to take into consideration appellant's economic losses sustained as a result of vacated withdrawal orders in assessing penalties.

III.

Discussion

A.

Challenges to Determinations of Violation

1. *Section 303(c)(1) Charge:*

Order of Withdrawal No. 1 WB was issued April 3, 1970 and in relevant part reads:

* * * Ventilation was short-circuited from the faces of the main entry and the crosscut off the main entry in 3 east section in that line brattice and a check curtain were raised and tied.

North American argues that the condition cited did not constitute a violation of section 303(c)(1) of the Act because the Bureau of Mines (now MESA)³ allegedly failed to prove "that miners were present, or that coal was being cut, mined or loaded, at the working faces * * *" in dispute⁴ (*Italics added*).

³ Effective July 16, 1973, MESA was substituted for the Bureau of Mines (Bureau) in all enforcement proceedings. See 38 F.R. 18695 (1973).

⁴ *Supra*, n. 2; p. 7.

Section 303(c)(1) of the Act⁵ and regulations promulgated pursuant thereto⁶ plainly require that the sections and faces subject to this health and safety standard must be operational, hence the terms, "working face" and "working section." The inspector who issued the citation in question, Mr. William Bazo, testified that the 3 East section of the mine was in operation at the time he made his inspection and that "within a good degree of certainty" "* * * coal was being cut, mined; or loaded at this section at the time the order was issued." (Tr. 88.) Mr. Bazo did say that he was not "absolutely" sure that the mine was operational, and the record reveals that his notes were somehow "lost." (Tr. 88-9.)

We are of the opinion that the inspector's testimony was sufficient to support the conclusion that the 3 East section of the mine was an active operational "working section" and we so find. His statements were apparently believed by the Judge and we do not feel that the lack of "absolute" certainty destroys the probative value of his evidence. The inability to produce the notes on the inspection is not significant since Mr. Bazo testified on the basis of apparent, independ-

⁵ Section 303(c)(1) reads in relevant part as follows:

"Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive and noxious gases, dust, and explosive fumes. * * *"

⁶ 30 CFR 75.302-75.302-1.

ent, personal recollection. Furthermore, the inspector's credibility is considerably enhanced by the failure of North American to present any rebutting evidence. In this connection, we are aware of North American's inability to call as a witness the employee who accompanied Mr. Bazo on his inspection because he was deceased. However, we discount this factor because his testimony might have been preserved; and more importantly, North American might have called other employee witnesses to testify, or introduced production or personnel records as evidence tending to show whether the faces in the 3 East section were operational at the time of the inspection. Accordingly, we affirm the Judge's ruling on this charge.

2. *Section 302(a) Charges:*

Notice of Violation 1 WB, dated June 24, 1970, was issued because of an alleged lack of temporary roof supports at a working face. North American challenges the finding of violation on the theory that MESA failed to prove that there was a lack of conformity to the existing roof control plan. A similar contention is advanced with respect to Notice 1 FWT, January 19, 1972. Appellant argues that the sole measure of compliance with section 302(a) is the approved and effective roof control plan. After the briefs were filed in this case, the Board in *Zeigler Coal Company*⁷ rejected such a contention and we perceive

no reason to reconsider our previously stated view. In that case, we held that where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect miners from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of section 302(a) of the Act. Accordingly, we affirm the Judge's ruling on these charges.

3. *Section 304(a) Charge:*

Order of Withdrawal 1 WB, dated December 15, 1970 and issued pursuant to section 104(c) of the Act, cited North American for alleged masses of combustible materials, "accumulations" of which are proscribed by section 304(a) of the Act. North American argues in substance that MESA failed to establish a prima facie case and that the Judge's finding of violation is not supported by the record.

The record reveals that the inspector, who issued the withdrawal order, observed some combustible materials in some shuttle car roadways in the 6 West section of the mine. However, he was unable to recall how many roadways were involved and he could not testify as to the depth or extent of the alleged "accumulations." (Tr. 244-249.)

The Judge perceived the deficiencies in the Government's evidentiary presentation but concluded only that it was not possible to determine the seriousness of the violation or the degree of negligence. (Dec. 10-11.) We are of the opinion that the

⁷ 2 IBMA 216, 80 I.D. 626, CCH Employment Safety and Health Guide par. 16,608 (1973).

missing evidence as to depth and extent should also have led the Judge to conclude that MESA had failed to make out a prima facie case as to the occurrence of a violation. In our view, an Administrative Law Judge may determine if there was a violation of section 304(a) only where the record contains sufficient evidence on the basis of which he can make an independent appraisal of whether the alleged mass of combustible material is of such a dangerous size in the circumstances that it constitutes an "accumulation" as that term is used in the Act. As a minimum, evidence of depth and extent must appear in the record; otherwise, a finding of violation is unjustified. In this case, the inspector's memory was faulty, the text of the citation was conclusory,⁸ and there were no field notes of the inspection to refresh recollection or serve as substantive evidence to fill the crucial gaps. The finding of violation and the associated assessment in the amount of \$500 must therefore be set aside. *Armco Steel Corporation*, 2 IBMA 359, 80 I.D. 790, CCH Employment Safety and Health Guide par. 17,043 (1973).

4. Section 304(d) Charges:

With respect to Order 3 TJD, August 16, 1971; 1 JF, September 3, 1971; and 1 TJD, September 16, 1971, North American challenges the findings of violation on the ground that the samples relied

on reflected only the incombustible content of the floor. North American urges that the samples should have reflected the combined incombustible content of the roof and ribs, as well as the floor, at the cited locations.

Section 304(d) was designed to prevent the occurrence of conditions which could lead to a fire, or still worse, an explosion. The floor samples in the instant case, falling as they did within the proscribed area, indicated a dangerous condition because a spark might very well have led to at least a fire. We hold therefore that a floor sample standing alone may be the basis of a finding that a section 304(d) violation has occurred.⁹ Accordingly, we conclude that the Judge did not err by determining that these alleged violations occurred. *Buffalo Mining Co.*, 2 IBMA 226, 80 I.D. 630, CCH Employment Safety and Health Guide par. 16,618 (1973).

5. 30 CFR 75.1720(a) Charge:

Notice 1 FWT was issued on January 14, 1972 when an inspector observed two miners performing tasks hazardous to the eyes without required protective goggles. The pertinent portion of the applicable regulation reads as follows:

* * * [E]ach miner regularly employed in the active workings of an under-

⁹ North American calls our attention to the Bureau of Mines inspection manual which sets forth methods of sampling. (Br. p. 16.) That manual is not a regulation of the Department and is not binding upon the Board. Moreover, the manual clearly indicates that where he deems appropriate, the inspector may take separate samples from the roof, ribs, or floor.

⁸ The order merely stated: "Coal dust and loose coal were accumulated along much of the shuttle-car roadways in 6 west section."

ground coal mine *shall be required* to wear the following protective clothing and devices:

(a) * * * face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles. (*Italics added.*)

A violation of this regulation occurs where an operator does not "*require*" a miner to wear safety goggles. North American contends in substance, and we agree, that an operator, in order to comply with the regulation, must establish a safety system designed to assure that employees wear safety goggles on appropriate occasions and must enforce such system with due diligence. Where the failure to wear glasses is entirely the result of the employee's disobedience or negligence rather than a lack of a *requirement* by the operator to wear them, then a violation has not occurred.

The uncontradicted evidence of record reveals that North American's Safety Director, Mr. Rex W. Jewkes, as part of his regular duties, issued safety glasses to every employee. He testified that he reissued safety glasses to every miner who lost or damaged his pair. He further stated that he instructed the miners to notify him when a fresh pair of glasses was needed and advised them repeatedly that the glasses must be worn when hazardous tasks are being performed. (Tr. 554-5.) The record also indicates that North American did not rely solely upon oral enforcement of this regulation. At all relevant times, signs with

three-inch letters were posted at prominent locations by which every miner must pass and which instructed employees, among other things, to use their safety glasses. (Tr. 549-50, 556-9; Pet. Ex. 9, 10, 11.) While there was no direct, conclusive evidence with respect to on-shift supervisory practices, it may be inferred from two items of testimony that North American did enforce this part of its safety program with due diligence. First, the inspector who issued the instant notice, Mr. Fred W. Tatton, Jr., testified that he had never previously found North American's practices concerning proper use of safety glasses deficient. Second, questioning of Mr. Jewkes by the Judge revealed that the operator had previously attempted disciplinary action against employees for infractions of safety rules (Tr. 555), presumably including those similar to the one now under discussion.

On the basis of the existing record we find that North American did in fact have a safety system: (1) designed to assure that all reasonable efforts are employed to insure that miners wear safety goggles at appropriate times and places; and (2) enforced with due diligence. We further find that the preponderance of the evidence indicates that the failure to comply with the operator's clear safety *requirement* in this case was due solely to the negligence of the employees involved rather than to any enforcement omission on the part of the operator. It is, therefore, the judg-

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ment of the Board that North American overcame the Government's prima facie case and that the subject notice of violation must be vacated.¹⁰

6. 30 CFR 70.100(a) Charges:

Notice 1 GM, dated December 17, 1971, and Notices 1 GM and 2 GM, dated January 4, 1972, alleged violations of the Secretary's respirable dust standards which at all relevant times proscribed cumulative concentrations in excess of 30 milligrams per cubic meter of air. 30 CFR 70.100(a), 70.211(b)(4), 70.221(b). Although it appears that only three notices of violation were issued, the Judge concluded that fourteen distinct violations occurred, and assessed an aggregate penalty in the amount of \$150. (Dec. 28.)

With respect to these three notices,¹¹ North American argues that the maximum number of violations which may be found is *three* rather than the *fourteen* found by the Judge. MESA does not contest this point, and we hold that there were only three violations. Nevertheless, while we conclude that the Judge erred in this respect, we regard the error as harmless with respect to

the penalties assessed. The Judge considered all of the conditions described in the three notices in reaching the amount he thought justified in the circumstances. In light of his determination that the violations as a group were neither serious nor the result of the operator's negligence and inasmuch as the assessment is relatively modest and consistent with the evidence of record, we see no reason to disturb the amount fixed by the Judge.

Apart from this general challenge, with respect to Notice 1 GM, dated December 17, 1971, North American contends that the cumulative concentration contained therein was not in excess of the regulatory limit. This notice was based on a computer printout containing seven samples with a cumulative concentration of 31.5 milligrams. (Govt. Ex. 10.) The Judge discarded two samples because of the possibility that they were "dumped" and should have been voided. (Dec. 28.) North American argues that in view of the fact that the cumulative concentration for the five remaining samples is only 13.5 milligrams, the finding of violation was erroneous.

The inspector who issued the notice, Mr. Grant McDonald, testified that the concentrations of dust in the two samples which the Judge subsequently omitted were unusually high, and that in the normal course of processing, they would have been closely examined in the MESA laboratory at Pittsburgh, in order to determine if either had

¹⁰ Where a miner intentionally, knowingly, recklessly, or negligently fails to comply with a requirement designed solely for his own protection, and where such failure does not endanger or create a hazard to anyone but himself, and where the operator has not condoned such conduct, we do not believe a violation may properly be charged to the operator. Cf. *Cam Industries, Inc.*, CCH Employment Safety and Health Guide par. 15,113 (1972).

¹¹ These notices relate to three distinct working sections and they so indicate.

been "dumped" and should therefore be voided.¹² (Tr. 594-5). He further stated, that if a sample were dumped, the printout would indicate that it had been voided. (Tr. 595). Since the printout does not show that the samples in question¹³ were voided, and inasmuch as the record does not contain any evidence to show that normal laboratory procedures were not followed, we believe that the Judge erred in discarding them.¹⁴

North American's argument is based upon the premise that the rul-

ing below which voided the two samples just discussed was correct. Having found that premise to be erroneous, the argument collapses and the finding of violation on this charge must be affirmed as modified herein.

B.

Challenges to Application of Statutory Criteria

North American also challenges the assessments with respect to each of the following:

Notice	Date	Cited violation
Order 1 WB-----	Apr. 3, 1970	30 U.S.C. 862(a).
Do-----do-----		30 U.S.C. 863(c)(1).
Do-----	Sept. 22, 1970	30 U.S.C. 864(a).
Do-----	Nov. 10, 1970	Do.
Do-----	Dec. 15, 1970	Do.
Order 3 TJD-----	Aug. 16, 1971	30 U.S.C. 864(d).
Order 1 JF-----	Sept. 3, 1971	Do.
Order 1 TJD-----	Sept. 16, 1971	Do.
Notice 1 GM-----	Dec. 17, 1971	30 CFR 70.100(a).
Do-----	Jan. 4, 1972	Do.
Notice 2 GM-----	do-----	Do.
Notice 1 FWT-----	Jan. 19, 1972	30 CFR 75.200.
Do-----	Feb. 1, 1972	30 CFR 75.1003(a).

Inasmuch as we have decided to set aside the findings of violation arising out of Order 1 WB, 12/15/

¹² A sample is taken by a cassette, containing a filter, which is attached to the miner as he begins his shift. If the cassette is operating properly, particles larger than ten microns will drop to the bottom. Occasionally, a cassette may be turned upside down and particles at the bottom will slide onto the filter. Such a cassette contains a "dump sample." (Tr. 593-4.)

¹³ The samples in dispute are cassettes 40479992 and 40479462 with dust concentrations of 08.5 and 09.5, respectively.

¹⁴ See *Castle Valley Mining Co.*, 3 IBMA 10, 81 I.D. 34, CCH Employment Safety and Health Guide par. 17,233 (1974).

70, there is no need to consider objections to the Judge's assessment based upon it. Likewise, we have already dealt with North American's allegations of error with respect to the aggregate assessment based upon Notices 1 GM, 12/17/71, 1 GM, 1/4/72, and 2 GM, 1/4/72 and have affirmed that assessment.

With respect to the remaining nine assessments, five are challenged on the grounds that the Judge misapplied the statutory criteria of

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good faith, previous history, gravity and negligence. (Orders 1 WB, 4/3/70, 1 WB, 4/3/70, 3 TJD, 8/16/71, 1 JF, 9/3/71, and 1 TJD, 9/16/71.) Assessments related to Orders 1 WB, 9/22/70, and 1 WB, 11/10/70, are appealed only with respect to the good faith and gravity criteria. The assessment upon Notice 1 FWT, 1/19/72 is attacked only upon the claims that the gravity and negligence criteria were misapplied. In the decision on Notice 1 FWT, 2/1/72, only the treatment of negligence is alleged to be erroneous.

As to five of the nine violations now under discussion, the Judge concluded that there was good faith in achieving rapid compliance. (Dec. 5, 21, 26.) He also noted that there was no evidence of a prior history of previous violations. (Dec. 5.) It is apparent that he considered these two criteria and made the required findings pursuant to section 109(a), and we are of the opinion that none of the assessments is so large as to indicate that the Judge abused his discretion in weighing either criterion. We, therefore, affirm the Judge with respect to these findings.

Turning now to the Judge's application of the gravity and negligence criteria, we call attention to what we have heretofore held in *Associated Drilling Company, Inc.*, 2 IBMA 95, 80 I.D. 317, CCH Employment Safety and Health Guide par. 15,747 (1973):

*** If the Judge's conclusion is that a violation of the Act has occurred, he must then make ultimate findings of fact on *each* of the six statutory criteria in section 109(a) (1) and state reasons for each finding to properly determine the amount of the penalty warranted. ***

We believe that this ruling is no more than a reflection of the clearly articulated policy of the Congress as stated in 5 U.S.C. § 557 in relevant part as follows:

*** All decisions, including initial * * * decisions * * * shall include a *statement of—*

(A) findings and conclusions, and *the reasons or basis therefor*, on all the material issues of fact, law, or discretion presented on the record * * * [*Italics added*].

We believe that it is also appropriate to recall what the Board has heretofore decided substantively with respect to the gravity and negligence criteria. In *Robert G. Lawson Coal Company*, 1 IBMA 115, 120, 79 I.D. 657, CCH Employment Safety and Health Guide par. 15,374 (1972), we held:

*** Each violation should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring. The potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the particular mine at the time the violation is detected. ***

In the same case, with respect to negligence, we held, 1 IBMA at 119, that:

*** Negligence involves the failure to do what a reasonable man would do under the same or similar circumstances

to prevent a violation of the Act. Negligence must be determined on the basis of circumstances leading to the existence or occurrence of the violation. * * *

In the absence of careful findings of fact and sufficient indication of the underlying rationale therefor, it is extremely difficult for the Board to review a decision and determine whether the Judge properly considered the gravity and negligence factors in arriving at a particular assessment. With respect to the relevant violations identified above, we are unable to ascertain from the Judge's decision the underlying rationale or basic findings which support his ultimate findings on negligence and gravity. These omissions preclude us from determining the accuracy and soundness of the challenges by North American to these assessments. Therefore, they must be set aside and remanded for redetermination.

C.

Challenge to Judge's Refusal to Consider Economic Losses Sustained as a Result of Allegedly "Wrongful Withdrawal Orders"

At the hearing in this case, North American introduced evidence to show economic losses resulting from withdrawal orders which were subsequently vacated. The evidence of such losses was received by the Judge over MESA's objections; however, in his decision, he did not state what, if any, weight he gave

such evidence. (Tr. 672-9, Pet. Ex. 12.)

On appeal, North American vigorously urges upon us two propositions of law:

(1.) * * * that economic losses resulting from the wrongful issuance of withdrawal orders is a relevant factor to be considered in determining the amount of penalties to be assessed in a civil penalty proceeding; and

(2.) * * * economic losses represent penalties * * * which * * * should be set off against civil penalties assessed to the extent of those civil penalties.¹⁵

The soundness of either or both of these propositions is strictly a matter of statutory construction since there are no relevant regulations. The pertinent portion of the Act is section 109(a)(1) which reads in relevant part as follows:

* * * In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

We must initially decide whether, by enumerating six mandatory criteria, Congress intended to exclude any other factors from the Secretary's consideration in determining the amount of a penalty. MESA contends that the Board should

¹⁵ Br. of Appellant, p. 48.

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apply the doctrine of statutory construction stated in the well-known maxim *expressio unius est exclusio alterius*.¹⁶ MESA points out that if Congress had intended to provide for the recognition of economic losses resulting from vacated withdrawal orders, it could have done so expressly or by providing that the Secretary could take into account, in addition to the enumerated criteria, such other factors as justice might require. Since Congress did neither, MESA would have us conclude that such economic losses may not be recognized to any extent.

We are of the opinion that this argument does not compel the strict conclusion that it reaches. We note that the restrictive word, "only" was not inserted in section 109(a) (1) of the Act, 30 U.S.C. 819(a) (1) (1970), concerning the required consideration of the six enumerated criteria. Also, we believe it significant that Congress did not prescribe dollar limits within the area of \$1 to \$10,000 for a particular violation or criterion, but did specifically instruct the Secretary to assess a civil penalty only after he has determined by decision, "* * * that a violation did occur, and the amount of the penalty *which is warranted*,

* * * (Italics added.) 30 U.S.C. § 819(a) (3) (1970).

In view of the omissions and precise expressions of Congress, we are satisfied that the setting of the amount of penalty was committed as a discretionary function to the Secretary and his delegates. We hold, therefore, that in making the assessment process discretionary, Congress intended that the Secretary, or anyone possessing his authority to bring a case under the Act to a final administrative conclusion, be empowered to take into consideration evidence regarding any factor, in addition to the six specific criteria, deemed relevant to the achievement of the statutory objectives. See *Zeigler Coal Company*.¹⁷

This Board has previously held that Congress intended that a penalty assessed pursuant to section 109 of the Act should be calculated to *deter* similar future violations and to induce compliance.¹⁸ We have also previously taken note of the independent penalizing, deterrent effects of the economic losses resulting from withdrawal orders.¹⁹ In order to avoid the imposition of a *total* economic loss which is oppressive rather than simply deterrent, a result Congress clearly did not intend, we conclude, that a Judge *may* take into account the economic losses suffered by an operator as a consequence of a closure order,

¹⁶ This doctrine is, as North American pointed out in oral argument, a guide to statutory construction rather than a conclusive argument. It is no substitute for a careful, independent appraisal of legislative intent. See *S.E.C. v. Joiner Leasing Corp.*, 320 U.S. 344, 350-1 (1943).

¹⁷ *Supra*, n. 7.

¹⁸ *Robert G. Lawson Coal Co.*, *supra*.

¹⁹ *Id.*

which is subsequently vacated,²⁰ as a mitigating factor in assessing a penalty for a violation arising out of a condition or practice cited in such order.²¹

On the other hand, we find nothing in the Act or in its legislative history revealing an intent by Congress to permit a dollar-for-dollar offset right. We also envision costly and burdensome administrative problems involved in such an offset which we are unwilling to impose upon MESA without a clearly articulated instruction to do so from Congress. Consequently, we reject the second proposition urged by North American and hold that there is no dollar-for-dollar offset permitted an operator against assessments in a penalty proceeding for economic losses sustained as a result of a vacated withdrawal order.²²

As an aid to clarification and ap-

²⁰ We do not subscribe to North American's use of the term "wrongful" in describing the withdrawal orders now before us. Withdrawal orders may be vacated for reasons not involving fault, and the question of whether they were "wrongfully" issued is irrelevant to the resolution of the question of law now under discussion. The significant fact is that they were vacated prior to the decision of the penalty proceeding or at the same time in a consolidated proceeding.

²¹ Counsel for North American informed us at oral argument that, unless relief is available under the Act, Congress has not provided a remedy for the economic losses sustained in this case either under the Tort Claims Act or elsewhere. See 28 U.S.C. § 2630 (1948).

²² In support of its claim that "the fact that the Act does not specifically provide for offsets is not fatal to Appellant's contention," North American has relied heavily upon *Cutler-Hammer, Inc. v. United States*, 416 F. 2d 1306 (Ct. Cl. 1969), Br. p. 41. We regard this case as distinguishable at least because the statute there involved specifically allowed a dollar-for-dollar offset in favor of the Government for inaccurate, inflated cost estimates

application of our rulings in this limited decision, we deem it appropriate to emphasize the following points: (1) the validity of a withdrawal order is not an issue in a penalty proceeding; ²³ (2) the withdrawal orders involved in considering economic loss as a mitigating factor are confined to those which have been vacated prior to the penalty proceeding being adjudicated or which are invalidated in a section 105 review proceeding which has been consolidated with the subject penalty proceeding; (3) economic losses resulting from such orders may be considered *only* with respect to assessments for violations arising from the conditions or practices cited in such order; (4) the fact that such losses occurred and the duration of the withdrawal orders before termination must be affirmatively pleaded by the operator in the subject penalty proceeding; otherwise, the judge need not consider the losses as a mitigating factor; (5) since there is no statutory right to a dollar-for-dollar offset, the *exact* amount of the alleged losses is not relevant; ²⁴ (6) a Judge has the dis-

and the question for decision was whether a counter-balancing offset in favor of the contractor for understatement was authorized. The Federal Coal Mine Health and Safety Act contains absolutely no authority for any offset whatsoever.

²³ *Zeigler Coal Co., supra*, n. 8; cf. *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610. CCH Employment Safety and Health Guide par. 16,567 (1973).

²⁴ We emphasize that hearing should not become unduly complicated by the injection of this mitigating consideration. Since exact dollar amounts are irrelevant, the evidentiary presentation related to this problem need not be especially voluminous and need not involve extensive pre-trial discovery of operator business records by MESA.

AREA DIRECTOR, ABERDEEN ET AL.

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cretion to assign whatever weight to such mitigating factor as he deems just or appropriate under the circumstances of each case, but in doing so should make appropriate findings with supporting reasons.

In view of the foregoing, we have decided to set aside the assessments made by the Judge in this case which grew out of the relevant vacated closure orders listed in petitioner's exhibit 12 and to remand them for redetermination consistent with this opinion.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-entitled dockets with respect to:

1. Notices 1 WB, 6/24/70, 1 FWT, 1/19/72, and Orders 3 TJD, 8/16/71, 1 JF, 9/3/71, 1 TJD, 9/16/71, insofar as they constitute Notices of Violation, IS AFFIRMED;

2. Order 1 WB, 4/3/70, insofar as it constitutes a Notice of Violation, and Notices 1 GM, 12/17/71, 1 GM, 1/4/72, and 2 GM, 1/4/72, IS AFFIRMED AS MODIFIED;

3. Order 1 WB, 12/15/70, insofar as it constitutes a Notice of Violation, and Notice 1 FWT, 1/14/72, IS REVERSED and the associated assessments thereon ARE SET ASIDE;

4. The assessments challenged on appeal related to violations founded upon Orders 1 WB, 4/3/70, 1 WB, 9/22/70, 1 WB, 11/10/70, 3 TJD, 8/16/71, 1 JF, 9/3/71, 1 TJD, 9/16/71, and to Notices 1 FWT, 1/19/72 and 1 FWT, 2/1/72, IS VACATED AND REMANDED for redetermination in conformity with Part B of the discussion *supra*; and

5. The assessments challenged on appeal related to violations arising out of Orders 2 TJD, 8/16/71 and 1 FWT, 1/31/72, IS VACATED AND REMANDED for redetermination in conformity with Part C of the discussion, *supra*.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ADMINISTRATIVE APPEAL OF
CLAIR COOMES

V.

AREA DIRECTOR,
ABERDEEN ET AL.

2 IBIA 257

Decided April 22, 1974

Appeal from an administrative decision of the Area Director, Aberdeen, affirming a decision of the Superintendent, Pine Ridge Agency.

Reversed and remanded.

**Indian Lands: Allotments: Generally—
Grazing Permits and Licenses: Gen-
erally**

Improvements placed on permitted land shall be considered affixed thereto unless excepted therefrom under the terms of the permit.

**APPEARANCES: E. Y. Berry, Esq.,
for Clair Coomes, appellant.**

*OPINION BY ADMINISTRA-
TIVE JUDGE WILSON*

*INTERIOR BOARD OF
INDIAN APPEALS*

The above-entitled matter comes before the Board on an appeal by Clair Coomes, hereinafter referred to as appellant, from a decision issued by the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota, under date of July 13, 1973. The Director affirmed a decision of the Superintendent, Pine Ridge Agency, Pine Ridge, South Dakota, issued on September 20, 1972. The Superintendent's decision, among other things, determined that (1) certain improvements situated on permitted lands, Grazing Unit 27, belonged to the landowner and (2) ordered appellant to either negotiate a lease at a fair rental based upon the premises as improved or vacate the premises.

It is from the foregoing decision that this appeal has been taken. In support thereof the appellant, among other things, alleges:

(1) that the improvements in

question belong to the appellant, and

(2) that such improvements should not be included and considered in arriving at a fair rental value for the premises in question.

The record discloses that the land involved herein, comprising the SE $\frac{1}{4}$, sec. 25, T. 38 N., R. 45 W., 6th P.M., South Dakota, is a part of the original allotment of Fred Running Horse, OS-921. Upon the death of the original allottee on September 25, 1928, the land passed by will to Peter Running Horse, Sr., OS-6015. Peter Running Horse, Sr., on July 20, 1933, conveyed the land in trust to his wife and present owner, Jessie Running Horse, OS-1164.

The record further discloses the premises have been under permit to the appellant for grazing purposes since the year 1935. Up until the year 1956 there appears to have been no change as to how improvements were to be reserved in the permit. Prior thereto the approved permit included a stamped statement regarding improvements to the following effect:

Permission is hereby given to remove, within 30 days from expiration of permit, all improvements which he may place upon the land.

There appears to have been no question on the part of all parties concerned that any and all improvements placed on the land under such permits were considered appellant's personal property.

However, beginning with the year 1956 the consent of the landowner was required by the Depart-

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ment with regard to placing and removing improvements from permitted lands. The record indicates as late as May 10, 1967, the Pine Ridge Agency was cognizant of the fact that the appellant's use of allotment 921 as a ranch headquarters site under his permit was authorized in writing by the landowner and that the improvements situated thereon belonged to appellant.

In a letter of May 10, 1967, to appellant, the agency advised in pertinent part:

*** If you do not wish to arrange such a lease *you should commence making arrangements for the removal of the improvements presently located on the land.*

*** (Italics supplied.)

The agency further advised:

*** The fact *you have utilized this land for headquarters for many years* at a very nominal rate should certainly [sic] be considered. *** (Italics supplied.)

In an appraisal report for sale purposes dated June 16, 1972, and approved by the Department on September 1, 1972, involving the tract in question, the following entry appears on page 2 thereof:

Pine Ridge Agency records indicate the present permittee has a permit for improvements; removable range improvements include house, sheds, fencing and windmill. A check of Shannon County tax records which are housed in Fall River County Court House in Hot Springs, South Dakota indicate the present permittee has listed for several years for assessment and taxation house and buildings on leased land; contribution value of stock, dam and well is included in overall-land value. (Italics supplied.)

The foregoing, coupled with the landowner's letter of October 2, 1973, to the effect she gave appellant the right to place and remove any and all improvements that he thought were necessary in the operation of the land, clearly dispels any question as to whom the improvements in question belonged. We fail to see how the Superintendent under the circumstances could possibly conclude as a matter of law that the improvements belonged to the landowner. Apparently, such conclusion was based largely on the fact that a document identified "Removable Range Improvements," submitted by the appellant in connection with his present permit, although signed by the landowner, was not dated or approved by the Superintendent. No explanation appears in the record why such document was never approved and it is only reasonable to conclude that it was an oversight on the part of the Agency to act thereon. In any event, the appellant had no control over the matter once he had obtained the signature of the owner and submitted it to the Agency for appropriate action.

We note that the Area Director on page 2 of his letter of July 13, 1973, advised the appellant that "the placing of a ranch headquarters does not appear to fall within the scope of the law or regulations." We disagree with the Superintendent's conclusion. Ever since 1935 when grazing units on Indian trust lands were first authorized, regula-

tions have provided for the placing and removal of improvements on such units.

Current regulations, 25 CFR 151.17, under which the appellant's present permit was approved, in pertinent part reads:

Improvements placed on the permitted land shall be considered affixed to the land unless specifically excepted therefrom under the permit terms. Written permission to construct and remove improvements must be secured from the Superintendent. The permit will specify the maximum time allowed for removal of improvements so excepted.

We can perceive of no plausible reasons why improvements, such as buildings, cannot be included thereunder so long as they are needed and are necessary for the full and proper utilization of grazing privileges under a permit. Buildings, in the case at bar, appear quite necessary and essential for the full utilization of the grazing privileges and for the successful operation of appellant's livestock enterprise. To hold otherwise would be unrealistic, to say the least.

The Board is in agreement with the Superintendent to the extent that the acreage upon which the ranch headquarters is situated should bring a higher return than the usual grazing fees. This only follows in view of the fact that the use of the acreage for ranch headquarters purposes constitutes a higher and better use than grazing. The record indicates the appellant also is in agreement therewith. However, the improvements comprising the ranch headquarters

should not be taken into consideration in arriving at a fair rental value for the acreage and we are in agreement with the appellant in that respect.

There is no indication in the record, as presently constituted, that the acreage involved herein was ever removed from the appellant's range unit, No. 27, as was at one time contemplated due to a possible sale by the owner. Accordingly, since the tract in question is still under appellant's grazing unit until October 31, 1975, we see no reason why the current permit cannot be modified to (1) reflect the fact that the improvements in issue herein [headquarters buildings, etc.] are the personal property of the appellant and removable within a reasonable time after the expiration of the permit, and (2) to reflect the fair rental unless the current rental is considered fair, based upon its highest and best use which in this case appears to be for the headquarters site and the remainder for grazing. The foregoing procedure would eliminate the necessity of the parties entering into a lease for the headquarters site only as suggested by the Agency.

In view of the reasons and conclusions set forth above the Board finds:

(1) That the improvements in issue, namely, the buildings, corrals, etc., situated on the SE $\frac{1}{4}$ sec. 25, T. 38 N., R. 45 W., are the property of the appellant, and

(2) that rentals for said tract should be based upon its highest

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and best use, i.e., ranch headquarters site and grazing, and

(3) that the current grazing permit should be modified to reflect above items (1) and (2).

In view of the reasons hereinabove set forth, the decision of the Area Director, dated July 13, 1973, should be reversed and the matter remanded for appropriate action consistent with the views set forth herein.

NOW, THEREFORE, by virtue of the special delegation of authority to the Board of Indian Appeals, by the Assistant Secretary of the Interior, dated September 13, 1973, the decision of the Area Director, Aberdeen, South Dakota, is hereby REVERSED and the matter is hereby REMANDED to the Area Director for appropriate action consistent with the views and findings set forth herein.

This decision is final for the Department.

ALEXANDER H. WILSON,

Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,

Administrative Judge.

RELIABLE COAL CORPORATION

3 IBMA 124

Decided April 22, 1974

Appeal by Reliable Coal Corporation from a decision by an Administrative Law Judge (Docket Nos. MORG 72-

28-P, 72-34-P, 72-90-P and 72-101-P), dated September 27, 1973, assessing civil penalties in the amount of \$1,650 for 17 violations of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Admissibility of Evidence

Sworn statements submitted after the expiration of a reasonable period set by the Administrative Law Judge for their submission and after his decision in the case were properly excluded from the record.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

In a section 109(a) proceeding involving an alleged violation of 30 CFR 75.601, once the Mining Enforcement and Safety Administration establishes the fact of violation, the burden of showing that approval was obtained for the condition cited is upon the operator.

APPEARANCES: Brooks E. Smith, Esq., for appellant, Reliable Coal Corporation; Richard V. Backley, Esq., Assistant Solicitor, and I. Avrum Fingeret, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1969).

*Factual and Procedural
Background*

The Mining Enforcement and Safety Administration (MESA) filed petitions for assessment of civil penalties in the above-captioned four cases after Reliable Coal Corporation (Reliable) requested hearing and formal adjudication in each case. An evidentiary hearing, with both parties represented by counsel, was held before an Administrative Law Judge (Judge) whose decision, assessing penalties in the amount of \$1,650 against Reliable for 17 violations of the Federal Coal Mine Health and Safety Act of 1969 (Act), is being appealed to the Board.

At the hearing, evidence of all the violations was introduced by MESA, and in 15 of the 17 alleged violations Reliable acknowledged the fact of violation, but pleaded mitigating circumstances, lack of personnel, or unavailability of safety equipment for each of these. One of the remaining two alleged violations was failure to have automatic circuit breakers as short-circuit protection for trailing cables. Reliable acknowledged that it was using single element trolley fuses. The other alleged violation was the use of air, which had passed through an abandoned area, to ventilate a working place. Reliable contended that the questioned area was not abandoned, but idled, and was used to introduce power to the working face, and hence, there was no violation of the section of the Act cited.

In his decision, the Judge considered the mitigating circumstances cited by Reliable in assessing the penalties. In the circuit breaker violation and the ventilation violation cited above, the Judge found that violations had occurred and assessed penalties taking into account the requisite six criteria of section 109(a) of the Act.

At the conclusion of the hearing on March 7, 1973, the Judge granted Reliable permission to take the depositions of three of its witnesses who were unable to testify and to submit them for inclusion in the record. On July 10, 1973, the Judge altered this grant to state that if the depositions could not be submitted within 45 days, statements could be submitted, preserving the Solicitor's right to comment thereon within ten days of receipt. On September 21, 1973, counsel for Reliable advised the Judge that the statements would be forthcoming in the near future. The Judge rendered his decision on September 27, 1973, assessing the penalties cited above and stating that since Reliable failed to submit the statements within the time allotted, he was of the opinion that the record should be and was closed. The statements were submitted October 2, 1973.

Reliable contends that the Judge's exclusion of these statements denied it " * * its right to present important and essential evidence and to brief the issues involved" and that no civil penalties were warranted for any of the Notices of Violation.

April 22, 1974

Issues Presented

A. Whether it was error for the Judge to exclude from the record in this case the sworn statements submitted by Reliable.

B. Whether the Judge's findings of fact and conclusions of law are supported by the evidence in this case.

Discussion

A.

At the conclusion of the hearing in this case, the Judge set forth a reasonable procedure to be followed by Reliable to obtain the testimony of the three absent witnesses. Four months later, he amended this procedure, making it even more flexible. A month after the period for submitting the statements had expired, the Judge closed the record, Reliable still not having submitted any kind of statement. The Board finds that the Judge was more than fair in trying to accommodate Reliable and that his action in closing the record was neither arbitrary or capricious nor an abuse of discretion. We conclude that his action was proper and did not constitute error. Accordingly, the sworn statements submitted by Reliable will not be considered by the Board in this appeal.

B.

Having reviewed the record and the briefs submitted by the parties, the Board concludes that Reliable has presented no evidence which would support a reversal of the

Judge's decision in the 15 violations grouped together above. The record clearly supports the Judge's findings of fact and conclusions of law in each of the 15 instances and indicates that he properly considered and applied the six statutory criteria in his assessment of penalties. Therefore, the Board will not disturb his decision on these 15 violations.

The remaining two alleged violations deserve special comment. Reliable acknowledged using single element trolley fuses, which use was the subject of the appropriate notice of violation. The provisions of 30 CFR 75.601 concerning short circuit protection of trailing cables permit the use of either circuit breakers with adequate capacity or dual element fuses with adequate capacity. This regulation does not mention single element fuses. The Bureau of Mines December 1971 inspector's manual states that, "[s]ingle element trolley fuses are not acceptable for trailing cable short circuit protection unless specifically listed in the *Federal Register* as being approved by the Secretary." Since a prima facie case of violation is established when evidence is introduced showing single element fuses were used, it was incumbent on Reliable to come forward with evidence to show that the fuses they used were approved, especially when single element fuses are not listed as allowable in 30 CFR 75.601. Reliable did not introduce any evidence to rebut MESA's prima facie case, and the Board,

therefore, will affirm the Judge's decision.

In considering the notice of violation involving the use of air passing through an abandoned area in the ventilation of a working place, *Notice No. 1, DCM, August 19, 1971*,² the Judge concluded that the area in question which had been idled for two years was "abandoned." As the Board views the definition of that term contained in section 318 of the Act, an area is either ventilated and examined as required by section 303 or it is an abandoned area.

Since the record establishes that the area in question was idled for two years it appears reasonable to assume that it was in fact abandoned. This determination is a factual one and should not rest on the uncommunicated future intentions of the operator as to whether or not the area will be reactivated. Thus the burden must be on the operator to come forward with evidence that the area in question in fact was ventilated and examined in the manner required for working places under section 303 of the Act. Reliable presented no such evidence and in the absence thereof the Board concludes that the area was abandoned and will uphold the Judge's decision in this regard. Accordingly, the Judge's decision on this violation is affirmed.

² Notice No. 1, DCM, August 19, 1971, states that, "[t]he active face workings of the 3 right section of 3 east were being ventilated by an air current that was passing through the temporary abandoned and partially mined out areas of Nos. 2 and 4 right main east sections [violating 30 CFR 75.3121]."

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision appealed from IS **AFFIRMED**.

IT IS FURTHER ORDERED that Reliable Coal Corporation pay the penalties assessed in the total amount of \$1,650 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

EASTERN COAL CORPORATION

3. IBMA 132

Decided April 22, 1974

Appeal by Eastern Coal Corporation (Eastern) from an initial decision of an Administrative Law Judge (Judge) (Docket No. PIKE 72-162-P), dated November 21, 1973, assessing civil penalties totaling \$1,775 pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969¹ for violations at its F-1 Mine on April 28, 1971.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Procedure of Assessment

The jurisdiction of an Administrative Law Judge to proceed in a section 109

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

April 22, 1974

civil penalty proceeding is not affected by the method of computation utilized by the Assessment Officer.

APPEARANCES: Wesley C. Marsh, Esq., on behalf of appellant, Eastern Coal Company; J. Philip Smith, Esq., Assistant Solicitor, William H. O'Riordan, Esq., Trial Attorney, on behalf of appellee, Mining Enforcement and Safety Administration (MESA).

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

With the exception of dates, violations and assessed civil penalties, the procedural background as it pertains to the informal assessment of penalties in this case is parallel with that set forth in *Ranger Fuel Corporation*, 2 IBMA 186, 80 I.D. 604, CCH Employment Safety and Health Guide, par. 16,541 (1973), and need not be reiterated. Basically, Eastern Coal Corporation (Eastern) contends that the jurisdiction of the Administrative Law Judge to hear this section 109 proceeding is predicated on and dependent upon a proper informal assessment procedure in accord with the decision in *National Independent Coal Operators Association v. Morton*, 357 F. Supp. 509 (D.D.C. 1973).² In view of our holding in *Buffalo Mining Company*, 2 IBMA

226, 80 I.D. 630, CCH Employment Safety and Health Guide, par. 16,618 (1973), this Board determines that Eastern's contention is without merit.³

In *Buffalo*, *supra*, we said in pertinent part:

MESA's response to this complaint is: that the machinery established for the assessment of penalties was entirely in accord with section 109 of the Act; that the informal proposed assessments made by the Assessment Officer were subject to rejection or payment by the operator at its option and in no way affected its right to a public hearing; that a request by the operator for public hearing was not an appeal in any sense, but initiated instead a *de novo* proceeding before the Judge; that the Judge under the Act and the regulations was neither bound by nor did he consider the informal proposed assessments in arriving at his determination of the appropriate penalties to be paid; that the Judge gave due and careful consideration to his determinations; and that the facts of record support the conclusion that his decision was fair and reasonable.⁴

Consonant with the foregoing, the decision of the Administrative Law Judge is affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision of the Administrative Law Judge IS HEREBY AF-

² Reversed in *National Independent Coal Operators Association v. Morton*, No. 73-1678 (D.C. Cir. February 11, 1974); *contra*, *Morton v. Delta Mining Inc., et al.*, No. 73-1752, 73-1753, and 73-1848 (3d Cir. March 20, 1974).

³ Eastern did not participate in the proceedings below and in accordance with 43 CFR 4.544, it was held to be in default.

⁴ See also *Western Slope Carbon, Inc.*, 2 IBMA 161, 80 I.D. 707, CCH Employment Safety and Health Guide, par. 16,300 (1973).

FIRMED; and Eastern Coal Corporation pay \$1,775 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

**IN THE MATTER OF A.K.P. COAL
COMPANY ET AL.**

3 IBMA 136

Decided April 24, 1974

Appeal by A.K.P. Coal Company et al. from an order of the Administrative Law Judge dismissing an application filed pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969, requesting a modification of the application of section 305(a)(2) of the Act. (P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

**Order Affirmed and Restraining
Order Dissolved.**

**Federal Coal Mine Health and Safety
Act of 1969: Modification of Applica-
tion of Mandatory Safety Standards:
Dismissal**

Where a petition for modification of the application of a mandatory safety standard fails to state grounds upon which such modification could be granted, even if proved, a motion to dismiss is properly granted.

APPEARANCES: John L. Kileullen, Esq., for appellant, A.K.P. Coal Company et al.; J. Davitt McAteer, Esq.,

for intervenor, United Mine Workers of America; Richard V. Backley, Esq., Assistant Solicitor, I. Avrum Fingeret, Esq., Trial Attorney and Michael T. Heenan, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

ORDER

The Board has for consideration an appeal by A.K.P. Coal Company, *et al.*, from an order of the Administrative Law Judge dismissing an application filed pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969, requesting a modification of the application of section 305(a)(2) of the Act.

Pursuant to request for expedited consideration of this appeal and the Board's Order of April 16, 1974, the Board heard oral argument of the parties on April 24, 1974. Briefs were filed on behalf of A.K.P. Coal Company, *et al.*, the Mining Enforcement and Safety Administration and the United Mine Workers of America.

Upon consideration of the arguments of the parties and review of the briefs herein, the Board finds that the petition fails to state grounds upon which modification of the application of section 305(a)(2) of the Act could be granted, even assuming that all allegations are proved. A hearing would serve no useful purpose. The motion to

(CROW ALLOTTEE NO. 3536, DECEASED)

April 25, 1974

dismiss properly lies and should be sustained.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Order of Dismissal of the Administrative Law Judge issued April 12, 1974, IS AFFIRMED and the Board's restraining order of April 16, 1974, IS HEREBY DISSOLVED.

C. E. ROGERS, JR.

Chief Administrative Judge.

DAVID DOANE,

Administrative Judge.

JAMES R. RICHARDS, *Director.*

*(Ex Officio Member
of the Board).*

ESTATE OF MARTIN SPOTTED
HORSE, SR.

(CROW ALLOTTEE NO. 3536,
DECEASED)

2 IBIA 265

Decided April 25, 1974

Appeal from Judge's denial of appellants' petition for rehearing.

AFFIRMED.

165.0 Indian Probate: Claims Against Estates: Generally

Under the Act of June 25, 1910, *as amended*, providing for the determination of heirs of deceased Indians who have left trust or restricted estates, the Secretary of the Interior has implied authority to allow all just claims against such estates.

165.0 Indian Probate: Claims Against Estates: Generally

Under the Act of November 24, 1942, in providing for the disposition of trust or restricted estates of Indians dying intestate without heirs, the Secretary of the Interior has express authority to allow such just claims against such estates prior to such allotments escheating to the tribe.

165.11 Indian Probate: Claims Against Estates: Secured Claim

A secured creditor, to the extent of his security, enjoys a priority over the unsecured claims of general creditors.

165.11 Indian Probate: Claims Against Estates: Secured Claim

In the absence of any agreement between the borrower and lender to the contrary, property which is security for a loan which subsequently is conveyed by Gift Deed should pass to the donee subject to the existing encumbrance.

APPEARANCES: Towe, Neely & Ball, Billings, Montana, by Thomas E. Towe, Esq., for appellants Martin Spotted Horse, Jr., Paul Spotted Horse, Regina Spotted Horse Stewart, and Willard Spotted Horse.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before the Board on appeal from the Administrative Law Judge's denial of appellants' petition for rehearing of their claim against the estate of the decedent.

Martin Spotted Horse, Sr. died intestate on December 4, 1970, at the age of 59 years. In his Order Determining Heirs dated January 11, 1972, Daniel Boos, Administrative Law Judge, Indian Probate, found

that the decedent's heirs under the laws of descent of the State of Montana were four children and two grandchildren. Their respective shares in the decedent's estate were found to be as follows:

	Relation	Part of Estate
Martin Spotted Horse, Jr.-----	Son-----	2/10
Paul Spotted Horse-----	Son-----	2/10
Regina Spotted Horse Stewart-----	Daughter-----	2/10
Willard Spotted Horse-----	Son-----	2/10
Children of Predeceased son, Stanley Spotted Horse:		
Angela R. Spotted Horse-----	Granddaughter-----	1/10
Reuben D. Spotted Horse-----	Grandson-----	1/10

A claim was allowed in the amount of \$7,642 which represented the unpaid balance on a loan dated April 13, 1964, from the Crow Tribe to the decedent, principal and interest, as of December 8, 1970. The loan was evidenced by a promissory note, and secured by a mortgage on 40 acres of trust land described as the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 26, T. 7 S., R. 33 E., M.P.M., and a general assignment of trust property and power to lease, all approved on the same date by the Bureau of Indian Affairs. By virtue of the assignment of trust property and power to lease, the decedent assigned as additional security for the loan, all income from trust land in which the decedent had an interest, and any income from any source and funds accruing to his Indian Money Account. By its terms, this assignment of income and power to lease constituted a lien upon the trust funds, and income superior to that of decedent's heirs.

Other claims that were allowed to be paid from funds held or accruing to the credit of the estate were (1) a preferred claim in the amount of \$58 by the Bullis Mortuary, Hardin, Montana, and (2) a general claim for groceries by George T. Cooley, Lodge Grass, Montana, evidenced by an unsecured promissory note for \$405.72 dated February 2, 1957. The trust real property belonging to the estate at decedent's death was valued at \$58,709.97.

A petition for rehearing was filed by all named heirs other than the grandchildren on February 2, 1972. A supplement to the petition was filed on February 11, 1972.

The petitioners sought to include in the decedent's estate a house previously unmentioned, and excluded from the inventory. In the alternative the petitioners prayed that all claims referred to, *supra*,

be disallowed as being contrary to law.

On March 15, 1972, Judge Boos issued an order denying the petition for rehearing, wherein he concluded that the house was "not within the jurisdictional authority of the examiner. Thus it was properly not included in the inventory." The Judge concluded that it was beyond his authority to disallow the creditors' claims "because to do so would involve a determination, express or implied, that the regulations are invalid insofar as they apply to the allowance of claims." He concluded that the "regulations must be regarded as controlling the actions of the examiners until such time as they may be amended or rescinded. Accordingly, the relief sought by the petitioners cannot be granted."

An appeal was filed by the four adult heirs on May 15, 1972, on the same grounds referred to in the petition for rehearing, set forth, *supra*.

Let us turn first to the question of whether the Administrative Law Judge had the authority to allow creditors' claims referred to *supra*, to be satisfied from income of trust property belonging to the estate?

The appellants contend that the Judge was foreclosed from so doing because of the General Allotment Act of February 8, 1887 (24 Stat. 388, 389), 25 U.S.C. §§ 348, 349 (1970), and the Crow Indian Allotment Act of June 4, 1920, 41 Stat. 751.

A distinction must be drawn between an unsecured claim which had no approval by the Secretary prior to the decedent's death, and a claim based on a promissory note and mortgage on trust land with an assignment of income, all approved by the Secretary at the time of execution of the documents.

The appellants state that the pertinent parts of these statutes specifically provide that the land is to be held in trust for the sole use and benefit of the Indian allottee, until the expiration of the trust period at which time the United States would convey said property to the Indian allottee or his heirs by patent in fee *free of all charges or encumbrances whatsoever*, and that the trust land would not be liable to the satisfaction of any debt contracted prior to the issuance of the fee patent.

As a preface to the case before us, we think it appropriate here to briefly look at the position of the Government vis-a-vis the Indian ward.

The Secretary of the Interior and his subordinates were given the responsibility of discharging the obligations of the United States to the Indian wards and have wide discretionary powers in such matters. *United States v. Anglin & Stevenson*, 145 F.2d 622 (10th Cir. 1944), *cert. den.* 65 S. Ct. 678, 324 U.S. 844 (1945).

As respects Indian affairs, the United States, acting through the Secretary of the Interior, is the guardian of the Indian wards. In

performing such duty, the government acts in a "proprietary capacity," and its discretion, when exercised in respect to an Indian ward, is less limitable than an ordinary congressional delegation of power. *Board of Commissioners of Pawnee County, State of Oklahoma, v. United States*, 139 F.2d 248 (10th Cir. 1943), *cert. den.* 64 S. Ct. 846, 847, 321 U.S. 795 (1944).

General power is given by 25 U.S.C. § 2 (1970), to the President, acting through the Secretary of the Interior to make regulations for the management of all Indian affairs and of all matters arising out of Indian relations. *United States v. Clapox*, 35 F. 575 (D.C. Oreg. 1888).

Regulations made under 25 U.S.C. § 9 (1970) for the purpose of carrying into effect the statutes relating to Indian affairs, have the force of statutory enactments. *United States v. Thurston County*, 143 F. 287 (8th Cir. 1906).

Much has transpired since the enactment of the General Allotment Act of February 8, 1887, which was filled with many gaps and deficiencies, and many revisions thereto were made. One of the revisions to the General Allotment Act was the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 372 (1970), which relates to the administration of estates of deceased allottees. This Act was itself amended and section 1 of the Act confers plenary authority upon the Secretary of the Interior to administer such estates. The pertinent part is as follows:

* * * [W]hen any Indian to whom an allotment of land has been made, or hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

In order to administer and carry this statute into effect, certain rules and regulations were promulgated by the Secretary of the Interior. *See* 43 CFR 4.200-4.297.

In particular, 43 CFR 4.251 provides in part:

After allowance of the costs of administration, including the probate fee, claims shall be allowed:

(a) Priority in payment shall be allowed in the following order except as otherwise provided in paragraph (b) of this section:

(1) Claims for expenses for last illness not in excess of \$500, and for funeral expenses not in excess of \$500;

* * * * *

(4) Claims of general creditors, including that portion of expenses of last illness not previously authorized in excess of \$500 and that portion of funeral charges not previously authorized in excess of \$500.

43 CFR 4.252 provides in part that:

Claims are payable from income from the lands remaining in trust. * * *

It is conceded that the Act of June 25, 1910, does not expressly authorize or provide for the payment of creditors' claims. But on the other hand, the Act does not expressly provide that payment of such claims is not authorized.

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We are of the opinion that this authority to pay creditors' claims is implied in the said Act, and that administration of the estate of the deceased Indian allottee includes therein payment of such creditors' claims as the *Secretary may approve* and find proper to be paid.

The allowance and payment of creditors' claims is inherent in the administration and settlement of decedents' estates. Prior to passage of the Act of June 25, 1910, probate of the trust estates of deceased Indians had been completed in the courts of the states where the land was located. Following the Act of June 25, 1910, and its amendment by the Act of February 14, 1913 (37 Stat. 678), which changed section 2 more than it did section 1, the Secretary of the Interior consistently exercised full probate authority including the settlement and payment of the decedent's debts.¹

¹ *Estate of Way-Zhe-Wah-co-geshig* a deceased Chippewa of White Oak Point (Interior Land Sales 91980-1911) November 22, 1911 (in which it is recited that the money to be distributed amounted to \$164.58, "less the funeral expenses and debts of the deceased"); *Estate of Thomas Williams* a deceased Quinaielt by order entered November 13, 1923, in an estate which had been pending a number of years. (The commissioner stated "Authority is granted you to make payment of the enclosed claim of Peter Williams against the estate of Thomas Williams in the sum of \$273.40."); *Estate of Lillie Standing Bear* Deceased Allottee No. 3648 of the Rosebud Sioux Tribe who died April 5, 1916. (The Assistant Secretary stated in his order of January 24, 1918, "The recommendation that * * * mother, be permitted to present a claim for compensation for the latter's care and support, is Approved"); In the *Estate of Grace Cox et al.*, 42 L.D. 493, 501 (1913) (the First Assistant Secretary approved the commissioner's recommendations, "Grace Cox's estate

The first official publication of probate regulations followed the passage of the Act of June 18, 1934 (48 Stat. 984). In the regulations effective May 31, 1935, published in 55 I.D. 263, provision was made for allowance and payment of decedents' debts.² The assumption of implied authority to allow claims in probate has been a consistent interpretation of the act of Congress by the Secretary since passage of the Act of June 25, 1910.

In keeping with the rationale of

could easily bear the expense of her care and maintenance during her illness. If no bill therefor was submitted and settled during the administration of her estate in 1905 an itemized account covering all legitimate charges for sustenance and nursing should now be submitted. Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate. The decision of the Department of May 8, 1913, as it appears to me, rests entirely on untenable grounds. It is at variance with long-established principles of the Secretary's authority in Indian matters, and in addition to effectuating in this instance, a questionable transaction, a spurious adoption would, if sustained, materially limit the Secretary's powers under the Act of June 25, 1910, and interfere with a consistent and strictly upright administration of Indian estates.

² In sec. 36 it was provided in part:

"Sec. 36. The notice mentioned in section 6 hereof shall also be directed 'To all persons having claims or accounts against decedent', * * *

"Persons having claims against the estates of deceased Indians may file same with the superintendent at any time after death of the decedent and up to the time of hearing by the examiner. * * *

"Claims against the estates of deceased Indians may be allowed (1) if based upon a debt contracted by the decedent and authorized during his lifetime by the superintendent, (2) if for last illness or funeral expenses in reasonable sums, (3) if just, and there is no legal bar thereto, (4) if elsewhere herein authorized and not prohibited. * * *

this Board, Congress by the Act of November 24, 1942 (56 Stat. 1021, 25 U.S.C. §§ 373a, 373b (1970)), in providing for the disposition of trust or restricted estates of Indians dying intestate without heirs, expressly provided that such allotments shall escheat to the tribe *"subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate * * *"*

For the Congress to allow for the payment of creditors' claims where the trust or restricted land was to escheat to the tribe but not to allow for the payment of creditors' claims where said property was to go to known heirs is void of all reason and logic. This we cannot nor would we impute to the Congress. Consequently, we find that the Secretary of the Interior has implied authority by virtue of the Act of June 25, 1910, *as amended*, to pay creditors' claims from the cash on hand or income accruing to said estate held in trust, as he expressly has under the Act of November 24, 1942. We further find that the Administrative Law Judge had the authority to allow the two unsecured claims in question.

We turn now to the secured claim, specifically, to the loan by the Crow Tribe to Martin Spotted Horse, Sr., for the purpose of construction of a new home.

By virtue of the Act of March 29, 1956 (70 Stat. 62, 25 U.S.C. § 483a (1970)) Indians were authorized, with the Secretary's approval, to

mortgage their trust or restricted lands.

Under the Act of May 7, 1948 (62 Stat. 211, 25 U.S.C. § 482 (1970)), funds loaned by the United States to a tribe may be reloaned by it. Regulations issued under this statute have been issued by the Secretary. See 25 CFR 91.13(a) and (b); and 25 CFR 121.61 (1973).

In section 9 of the Application for Loan, the decedent and his spouse agreed among other things that:

* * * As additional security for my loan, I hereby assign to the lender, all income from trust land in which I now have or may in the future acquire an interest, and any income from any source and funds from any source accruing to my Indian Money Account. * * * I understand and agree that in the case of my death, this assignment of income and power to lease shall constitute a claim against trust funds and income superior to that of my heirs. * * *

An Assignment of Trust Property and Power to Lease was also executed by the decedent, his spouse, and the Tribe, and approved by the Bureau of Indian Affairs. The decedent and his spouse agreed to several provisions pertinent among which we consider to be sections 3 and 6 thereof.

Section 3 provides that:

* * * (b) all income from trust land in which I now have or may in the future acquire an interest; (c) any income from any source and any funds from any source accruing to my individual Indian account. * * *

Section 6 provides that:

* * * It is understood that in the case of my death, this assignment and power

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to lease shall constitute a claim against trust funds, income, or trust property superior to that of my heirs. * * *

From the foregoing it is clearly apparent that the Secretary of the Interior was authorized to make the loan to the tribe and the tribe in turn to the decedent secured among other things by all income from trust lands in which decedent had an interest, present or future. It is equally clear from an examination of the Preliminary Loan Application, the Loan Application, and all related documents, that the decedent and all parties concerned intended that the amount of the loan was to be repaid first from income derived from trust lands through lease or otherwise. We find that this loan was made in compliance with the Act of May 7, 1948 (62 Stat. 211, 25 U.S.C. § 482 (1970)) and the rules and regulations pertaining thereto promulgated by the Secretary of the Interior.

Turning finally to whether the house should be included in the decedent's estate?

The house was built and completed in February 1965 with the proceeds of the loan on trust land described as SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 26, T. 7 S., R. 33 E., Principal Meridian, Montana.

It appears that subsequent to the completion of the house the decedent conveyed by Gift Deed, the SE $\frac{1}{4}$ SW $\frac{1}{4}$ with the house thereon to his son Martin Spotted Horse, Jr., by mistake on December 17, 1965. On January 24, 1967, Martin Spotted

Horse, Jr., conveyed by Gift Deed this same property with the house thereon to his brother Stanley Spotted Horse. Stanley Spotted Horse died on July 15, 1970, and Martin Spotted Horse, Sr., died on December 4, 1970.

The appellants contend that the house on SE $\frac{1}{4}$ SW $\frac{1}{4}$ is part of the decedent's estate, relying on section 9 of the Application for Loan, the pertinent part of which reads as follows:

* * * Until my indebtedness to the lender is repaid in full, any buildings, fences, or fixtures built wholly or in part with funds obtained under this application shall not be a part of the land. * * *

We cannot agree with this contention. We believe that it is necessary to look to the complete record, including the Preliminary Application for Loan, the Application for Loan, the Promissory Note, and the Assignment of Trust Property and Power to Lease, etc., to determine the true intent of the decedent and the lender.

The decedent conveyed separately by Gift Deeds in 1965 and 1966 subsequent to the granting of the loan and the completion of the house, various tracts of his trust lands to his children including the land on which the house was located. These conveyances were made subject to the Assignment of Trust Property and Power to Lease. We take official notice of these conveyances.

We do not agree with the appellants' contention that either the property pledged as collateral for

the loan must be included within the assets of the estate, or the claim should be allowed only for the amount of any deficiency after application of the proceeds from the sale of the pledged collateral.

It is elementary that the management, settlement or administration of the estate of a deceased person relates primarily and fundamentally to *personal* property alone, but nevertheless debts and charges remain obligatory on the estate as long as property of the deceased may be found for their satisfaction. Hence if the personal assets prove insufficient the deficiency would be satisfied from the collateral. The collateral pledged at the completion of the loan transaction included all of the income from all of the land that he *then* owned. He conveyed part of this during his lifetime, and in case of need, resort thereto could be had. Lacking any allegation that the income from such lands may be necessary to satisfy the debt evidenced by the promissory note signed by the decedent, no finding is made here. Nor is any call made to foreclose the mortgage on land subsequently deeded to one of the heirs.

We agree that had there not been sufficient trust property belonging to the decedent's estate at the date of his death from which income could be derived from leases, etc., to satisfy this indebtedness, then we could look to the collateral.

We find that the decedent intended that these conveyances of trust lands, including the house, to be *inter vivos* gifts to his children

and as such are not to be included as part of his estate requiring a probate order of distribution.

To recapitulate, we find that the Administrative Law Judge had the authority both implied and expressed to allow creditors' claims by virtue of the Acts of June 25, 1910, *as amended*, and November 24, 1942. (*See* 36 Stat. 855, 25 U.S.C. § 372 (1970)) and (56 Stat. 1021, 1022, 25 U.S.C. §§ 373a and b (1970).)

We further find by virtue of the Act of May 7, 1948 the Secretary of the Interior is authorized to make loans under such rules and regulations as he may prescribe to Indian tribes, bands, groups, and individual Indians for the purpose of promoting the economic development of such tribes and their members and that the tribes may reloan it to the individual Indian secured by such securities as the Secretary and the approving officer may require (*See* 62 Stat. 211, 25 U.S.C. § 482 (1970)).

We find no merit to any of the contentions raised against the decision and the order of the Judge denying the petition for rehearing. Furthermore, we find that the case of *Running Horse v. Udall*, 211 F. Supp. 586 (D.C. D.C. 1962) cited by appellants in support of their contention that the Judge had no authority to allow creditors' claims is not applicable here.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is DISMISSED, and

ET AL.

April 26, 1974

the ORDER DETERMINING HEIRS of January 11, 1972, stands unchanged.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

ALEXANDER H. WILSON,
Administrative Judge.

IN THE MATTER OF
AMIGO SMOKELESS COAL
COMPANY

BETH-ELKHORN CORPORATION
BETHLEHEM MINES
CORPORATION
CLINCHFIELD COAL COMPANY
EASTERN ASSOCIATED
COAL CORP.

EASTERN COAL CORPORATION
KENTLAND-ELKHORN COAL
CORPORATION

PEABODY COAL COMPANY
ROCHESTER & PITTSBURGH
COAL CO.

WINSTON MINING COMPANY

3 IBMA 139

Decided April 26, 1974

Interlocutory certification of ruling by an Administrative Law Judge upholding the right of ten coal mine operators to the production of certain documents in fifty-four separate civil penalty proceedings consolidated for

the purpose of such ruling. (Docket Nos. listed in Addendum No. 1 hereto.)

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Production of Documents

Where jurisdiction has vested in an Administrative Law Judge in a proceeding under the Act, the Mining Enforcement and Safety Administration is not insulated by 5 U.S.C. §§ 552(b)(5) or 552(b)(7) (1970) of the Freedom of Information Act from producing inspectors' notes or reports made in connection with alleged violations which are the subject of the proceeding.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Production of Documents

Where, in a civil penalty proceeding, a coal mine operator shows that he needs inspectors' reports and notes, prepared in connection with the issuance of notices of violation or orders of withdrawal, so that he may evaluate his case to determine whether to settle or further litigate, good cause for an order of production has been shown pursuant to 43 CFR 4.585 and such documents are relevant to the proceeding.

APPEARANCES: J. Philip Smith, Esq., Assistant Solicitor, Michael M. Hunter, Esq., Trial Attorney for appellant, Mining Enforcement and Safety Administration; Daniel M. Darragh, Esq., Raymond E. Davis, Esq., and Thomas W. Ehrke, Esq., for appellees, Amigo Smokeless Coal Company, et al., and Lynn Poole, Esq., for Bituminous Coal Operators' Association, Intervenor.

MEMORANDUM OPINION
AND ORDER

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

This is an interlocutory certification of a ruling and order issued October 19, 1973, by Administrative Law Judge Richard C. Steffey (Judge), granting, in part, various motions by the ten above-named operators for the production of documents in fifty-four (54) separate civil penalty proceedings consolidated by the Judge. On November 15, 1973, pursuant to a request from MESA, in accordance with 43 CFR 4.591, the Judge certified for review by this Board the rulings included in his October 19 order. On November 27, 1973, this Board accepted certification and set the case for oral argument. Oral argument was held before the Board on December 17, 1973.

Background

MESA initiated the fifty-four (54) proceedings involved in this appeal by filing petitions for the assessment of civil penalties pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.¹

Between the period of June 1973 and October 1973, the listed operators, following receipt of the Peti-

tions, filed motions, pursuant to 43 CFR 4.585, with the Judge seeking an order that would require MESA to produce for inspection and/or photocopying inspectors' reports used to evaluate gravity, negligence, and good faith effort to achieve rapid compliance, as well as notes relied upon by MESA's inspectors to refresh their recollection of the facts surrounding each alleged violation, together with the results of any laboratory analyses pertaining to those violations.

In support of their motions to produce the documents, and to show the existence of such material, the operators noted that a public meeting was held on April 19, 1973, at which Government personnel distributed material describing statements which Federal coal mine inspectors would be required to prepare with respect to each violation they cited.² It was represented at the meeting that the inspectors' reports would not only contain facts describing the circumstances surrounding the alleged violations, but would also be expected to contain facts bearing on three of the six criteria set forth in section 109(a) (1) of the Act, i.e., the gravity of the alleged violation, the negligence of the operator, and the good faith demonstrated by the operator in achieving rapid compliance with the Act after being notified of an alleged violation. The operators contend that disclosure of the docu-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970). The docket numbers and MESA control numbers identifying the subject 54 proceedings are set forth in Addendum No. 1 attached.

² Pertinent portions are attached as Addendum No. 2.

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ments requested is a legitimate matter of pre-hearing discovery and that without the information contained therein they cannot intelligently evaluate their respective positions and decide whether to pay a proposed assessment or to go to the cost and inconvenience of proceeding with an evidentiary hearing.

MESA resisted the motions to produce such records on three grounds: (1) that the material requested is specifically exempted from disclosure under subsections (5) and (7) of the Public Information Act, 5 U.S.C. § 552(b), dealing with internal communications and matters pertaining to investigatory files for law enforcement; (2) that the operators have not established good cause for production of such material; and (3) that such material would not be relevant in a *de novo* proceeding under section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Timely briefs were filed by the parties³ and during the course of oral argument before the Board, counsel for MESA advised that it had abandoned objections to production of the results of laboratory analyses pertaining to the alleged violations, but was continuing its objection to production of the reports and notes prepared by inspectors in connection with issuance of notices of violation.

³ BCOA requested and was granted permission to intervene on the side of the operators.

Discussion

I.

We believe that MESA's contentions based upon subsections (b) (5) and (7) of the Freedom of Information Act are without merit. The underlying purpose of that Act as we understand it was to increase *public* access to governmental records. Although federal district courts have in many instances used "discovery" criteria as guidelines to determine whether certain government documents and records should be released to the public, we believe that line of decisions clearly differentiates the rights of the public from a party-litigant's right to pre-trial discovery. The question before us is whether the operators as *party-litigants* may have a right of access to such material under usual discovery procedures. We hold that they do.

II.

We have carefully reviewed MESA's argument that the operators have failed to show "good cause" to obtain the requested material pursuant to 43 CFR 4.585, which provides in pertinent part:

*** For *good cause* shown, the Administrative Law Judge may order a party to produce and permit inspection and copying or photographing of designated documents *relevant* to the proceeding. (Italics added.)

We cannot agree with the argument put forward by MESA on this point. It seems obvious to us, as it apparently did to the Judge, that the notes and records made by the inspector in connection with issuing notices of violation or withdrawal orders and made at the time of, or shortly after, his inspection, are most relevant to the factual issues involved in a section 109(a) penalty proceeding under the Act. And certainly, they are relevant to the reaching of a decision by an operator whether to pay or attempt to settle a proposed monetary assessment, instead of going forward with an evidentiary hearing. The operators contend that very limited information is contained in a notice of violation and/or order of withdrawal, or in the letter of proposed assessment served upon them by MESA, and that without disclosure to them of the requested background information, they cannot make an intelligent decision on these questions.

The operators further allege that their request for the material is in accordance with the Administrative Procedure Act, 5 U.S.C. § 554(b) (3), requiring in pertinent part that persons entitled to notice of an agency hearing shall be timely informed on the matters of fact and law asserted. We think this argument is well taken and are of the opinion that the operators have established good cause to obtain the requested material, as party-litigants, under well-recognized rules of discovery. *Mudge v. Thomas J.*

Hughes Constr. Co., 95 ALR 2d 1055, 16 App. Div. 2d 106, 225 NYS 2d 833 (1962); *McDuffey v. Boston & Maine Railroad*, 102 N.H. 179, 152 A.2d 606 (1959).

We have also considered MESA's contention that:

Each notice/order in fact contains the substantive information concerning the violations of the Act set forth in the Petition. Accordingly, the operators are presently in possession of all the material facts and relevant information necessary to "properly evaluate or answer" the respective petitions for assessment of civil penalty.

We must also reject this contention. We think it sufficient to note that MESA apparently considers such information inadequate for its own needs, particularly in view of its instructions to its inspectors "that an inspector analyze and set forth certain facts and circumstances surrounding the issuance of each notice or order which do not appear in the notice or order."⁴

III.

MESA finally argues that inasmuch as the proceedings before an administrative law judge are *de novo*, any written materials prepared at the administrative level in support of notices, orders, and proposed assessments are irrelevant to such proceedings and therefore should not be subject to disclosure.

This contention is also without merit. For the reasons already stated, these inspectors' reports and notes contain information pertinent

⁴ See Addendum No. 2 hereto.

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to the fact-finding process in hearing. The fact that they may have been prepared for the purpose of issuing a proposed assessment does not make them irrelevant for the purpose of showing what the inspector observed at the time of issuing the notices or orders directly relating to the fact of a violation and the statutory criteria.

In support of our holding that the subject documents are relevant for both substantive and impeachment purposes, we note that the Occupational Safety and Health Review Commission reached a similar conclusion in *Frazee Construction Co.*, CCH Employment Safety and Health Guide par. 16,409 (1973). There, the Commission affirmed an Administrative Law Judge's order requiring production of notes and memoranda prepared during inspections. MESA seeks to distinguish that case on the ground that the request for production occurred after the witness had referred to the documents in testimony before the Judge. We are of the opinion that this distinction is inapplicable because time of production has nothing whatever to do with determining if an operator has shown "good cause" or "relevance" for purposes of right to production.

Apart from "relevance," we have concluded that MESA has not shown that the documents in question come within any recognized evidentiary privilege. *See Consolidated Box Co., Inc. v. United States*,

No. 622-71 (Ct. Cl. 1973). Naturally, if MESA had established such a privilege, we would have to conclude that "good cause" had not been shown and deny the request for production. If a claim of privilege is raised in proceedings before a Judge, he may of course examine the documents in dispute *in camera* before deciding whether to grant a production motion. Here, however, MESA has neither established nor even claimed any such privilege other than with respect to the application of the exemptions under the Freedom of Information Act.

Therefore, in view of the showing by the operators of relevance and need for the documents, we hold that "good cause" was shown in satisfaction of 43 CFR 4.585.

ORDER

WHEREFORE, pursuant to the authority delegated to this Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's order issued October 19, 1973, IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

DAVID DOANE,
Administrative Judge.

HOWARD J.
SCHELLENBERG, JR.,
Alternate Administrative Judge.

ADDENDUM NO. 1
Civil Penalty Proceedings

	Docket Numbers	MESA control numbers
Amigo Smokeless Coal Co.-----	HOPE 74-3-P-----	1019-40
	No. 2 Mine	
	HOPE 74-18-P-----	563-40
	No. 2-A Mine	
Beth-Elkhorn Corp.-----	PIKE 73-176-P-----	4165-40
	No. 29-A Mine	
	PIKE 74-12-P-----	1683-40
	No. 25 U.G. Mine	
Bethlehem Mines Corp.-----	PITT 73-449-P-----	2111-40
	No. 31 Mine	
	PITT 73-461-P-----	2348-40
	PITT 74-1-P-----	2348-41
	PITT 74-7-P-----	2348-42
	Cambria Slope No. 33 Mine	
	PITT 73-464-P-----	2366-40
	PITT 73-469-P-----	2366-41
	PITT 74-18-P-----	2366-42
	No. 32 Mine	
	PITT 74-5-P-----	2370-41
	PITT 74-13-P-----	2370-40
	Somerset No. 60 Mine	
	PITT 74-24-P-----	2167-40
	PITT 74-60-P-----	2167-41
	No. 77 Mine	
	HOPE 74-9-P-----	812-40
	No. 114 Mine	
	HOPE 74-31-P-----	576-40
	HOPE 74-52-P-----	576-41
	No. 111 Mine	
	HOPE 74-32-P-----	625-40
	No. 115 Mine	
	MORG 74-11-P-----	904-41
	MORG 74-12-P-----	904-42
	MORG 74-15-P-----	904-40
	No. 41 Mine	
	PITT 74-85-P-----	2382-40
	No. 51 Mine	
	PITT 74-101-P-----	2379-40
	No. 38 Mine	
Clinchfield Coal Co.-----	NORT 73-231-P-----	166-41
	NORT 73-233-P-----	166-40
	Chaney Creek No. 2 Mine	
	NORT 73-232-P-----	159-41
	Hagy No. 1 Mine	
	NORT 73-234-P-----	214-43

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ADDENDUM NO. 1—Continued

	Docket Numbers	MESA control numbers
	Lambert Fork Mine	
	NORT 73-235-P-----	31-41
	Birchfield No. 2 Mine	
	NORT 74-41-P-----	336-44
	NORT 74-48-P-----	336-42
	NORT 74-52-P-----	336-41
	NORT 74-55-P-----	336-45
	Moss No. 3, Portal A Mine	
Eastern Associated Coal Corp-----	PITT 74-12-P-----	2324-41
	PITT 74-44-P-----	2324-42
	Colver Mine	
	PITT 74-110-P-----	2275-40
	Delmont Mine	
Eastern Coal Corp-----	PIKE 74-11-P-----	1986-41
	PIKE 74-21-P-----	1986-42
	Stone No. 4 Mine	
	PIKE 74-27-P-----	13197-40
	Preparation Plant	
Kentland-Elkhorn Coal Corp-----	PIKE 73-179-P-----	2050-42
	Kentland No. 2 Mine	
Peabody Coal Co-----	BARB 73-392-P-----	1463-40
	BARB 73-403-P-----	1463-43
	BARB 74-2-P-----	1463-44
	BARB 74-4-P-----	1463-42
	BARB 74-5-P-----	1463-45
	Camp No. 2 Mine	
	BARB 73-407-P-----	13012-40
	Warrior Pitt Mine	
	BARB 74-6-P-----	1988-40
	River Queen No. 1 Mine	
	BARB 74-14-P-----	1935-40
	Ken No. 4 Mine	
Rochester & Pittsburgh Coal Co-----	PITT 74-55-P-----	2299-40
	PITT 74-67-P-----	2299-41
	Emilie Nos. 1 and 2 Mine	
	PITT 74-58-P-----	2322-40
	Margaret No. 7 Mine	
	PITT 74-68-P-----	2364-41
	Jane Nos. 1 and 2 Mine	
Winston Mining Co-----	NORT 74-73-P-----	422-41
	NORT 74-74-P-----	422-40
	No. 11 Mine	

ADDENDUM NO. 2

INSPECTOR'S STATEMENT—GRAVITY, NEGLIGENCE, AND GOOD FAITH

1. Section 109(a) of the Act, requires that a civil penalty be assessed for each violation of a mandatory health or safety standard and any other provisions of the Act, except the provisions of Title IV. In order to provide sufficient data for consideration in the assessment of penalties it is necessary that an inspector analyze and *set forth certain facts and circumstances surrounding the issuance of each notice or order, which do not appear in the notice or order.* (Italics added.)

* * * * *

2. The information which the inspector (MESA) is being asked to make available at this time for each violation cited concern only the *facts and circumstances* surrounding the violation and three criteria—GRAVITY of the violation, the NEGLIGENCE of the operator, and the GOOD FAITH demonstrated by the operator to achieve rapid compliance. (Italics added.) The inspector * * * should realize that his analysis and report will influence and be given weight by others. The inspector should therefore be able to substantiate the *facts* stated in the report.

* * * * *

3. *Statement Report.* The Statement Report shall be a description of the facts, conditions, actions of

the operator, and circumstances surrounding the violation which the inspector has observed or determined by investigation, inquiry, or discussion with the operator, supervisor, mine foreman, section foreman, miners or others which lead him to make the statements of fact contained in the report. The description should be concise and brief but at the same time convey a sufficient description upon which others may form a judgment.

* * * * *

The Report shall not be given to or served upon the operator by the inspector. The Report should not be filled in in the presence of the operator or his mine employees. The Report should be filled in at the inspector's office, or at home, or at some other convenient location off of the mine property (motel room or inside the inspector's car away from the mine). In some instances, * * *, completion of the Reports may have to await obtaining further information. In such cases the inspector should make sufficient notes to use for later completion of the Report.

APPEAL OF WEST ELIZABETH INDUSTRIAL EQUIPMENT COMPANY

IBCA-935-10-71

Decided April 30, 1974

Contract No. EA0-S-71-1, Sale of Government Property, Eastern Administrative Office, Bureau of Mines.

COMPANY

April 30, 1974

Denied Upon Reconsideration.**Rules of Practice: Appeals: Reconsideration—Contracts: Construction and Operation: Intent of Parties.**

The Board reaffirms its original decision pertaining to the Sale of Government-owned property where upon reconsideration it finds that appellants' motion raises no new questions of fact or of law and that contrary to the appellant's assertions the testimony offered as well as the record as a whole supports the Board's decision.

APPEARANCES: Mr. E. Brooks Keffer, Jr., Attorney at Law, Hart Childs Hepburn Ross & Putnam, Philadelphia, Pennsylvania for appellant; Mr. William H. Thornton, Jr., Department Counsel, Philadelphia, Pennsylvania for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD**INTERIOR BOARD OF CONTRACT APPEALS**

This appeal is before the Board on appellant's motion for reconsideration.

Summary of Facts

The facts were set forth in detail in the Board's original decision and only those facts which are pertinent to the reconsideration will be summarized here.

Contract No. EAO-S-71-1 for dismantling and removal of an open-hearth furnace, blast furnace, forging press, pig casting machine

and associated equipment and materials was awarded to appellant on October 7, 1970. The original contract time of ten weeks was extended by the contracting officer, at appellant's request, to a period of nearly six months, ending on April 3, 1971. The specifications described the subject matter of the contract as installed and in place at the U.S. Bureau of Mines, Building 19, Bruceton Station, Bruceton, Pennsylvania. At or near the end of the contract period, as extended, a dispute arose over sixteen items claimed by appellant which the Government denied were a part of the contract. A timely appeal was taken from the contracting officer's decision. The Board's original decision of October 19, 1973 sustained the appeal as to three items and denied the appeal as to the remaining thirteen items.

Appellant asks for reconsideration of twelve of the thirteen items. The reasons assigned as a basis for the motion for reconsideration are entirely factual. No new evidence is alleged and no citation of any precedent is offered. Appellant merely contends that certain portions of the testimony were not given fair, adequate or proper consideration and that the Board's partial denial of the appeal is unsupported by the record when taken as a whole.

Appellant correctly observes that the Board's decision denied the appeal as to Items 2, 3, 4, 6, 7, 8 and 16 on the basis that those items were

located in Building 19 on March 3, 1971 when appellant's president, Mr. Edward J. Toth, wrote to the contracting officer and represented that "the interior work on Building 19 had been completed." At that time he requested a one month extension to complete the remaining outside work. Since the contract called for both dismantling and removal of the four named items and associated materials and equipment, we found that the property located inside Building 19, at the time the appellant requested the one month extension to complete the outside work, was property which did not pass to the appellant under the contract of sale.

In an attempt to avoid the consequences of its representation that the inside work was complete on March 3, 1971, appellant asserts on page three of its motion that "Mr. Toth stated the plain meaning of his letter of March 3 by testifying that when he used the word 'work' he meant 'dismantling.' (N.T. 15.)" Contrary to this assertion, page 15 of the transcript of the hearing contains no reference to the March 3 letter. It does, however, report the following colloquy on direct examination of Mr. Toth by his counsel:

Q. Now, were there any other areas other than in Building 19 that you had work to do?

A. Well, yes. When you say work, do you mean dismantling?

Q. Yes.

This establishes that appellant's attorney intended the definition of work to be restricted to dismantling, but does little to reveal Mr.

Toth's normal usage of the word. More useful testimony appears elsewhere in the transcript. At page 19, line 9, Mr. Toth described the first thing he did at the site: "We went to work and took out the forging press" indicating that he included removal in the term "work." On page 20 the following colloquy appears between Mr. Toth and his counsel:

Q. So that when you were through working in the shed, what was left there?

A. I believe all that was left was the power saw and possibly a drill press.

Q. Why did you leave the power saw there?

A. These units were being used by another division there, another part of the operation, some testing laboratory.

We interpret these responses to indicate that Mr. Toth regularly used the word "work" to include removal and that he did not expect to get property assigned to divisions other than the Metallurgy Division which was selling the surplus property.

Abandoning for the moment its argument that certain portions of the testimony were not given fair, adequate or proper consideration, the appellant asserts on page 3 of its motion that a lack of testimony should be considered. Referring to the seven items which our decision found to be in Building 19 on March 3, 1971 when appellant represented that the interior work on Building 19 had been completed, the appellant asserts that "there is no direct testimony that these items were left in Building 19 by the appellant on March 3, 1971, or indeed

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that all of such items were even in the building at that time."

The difficulty of sustaining this argument is demonstrated by the appellant's next paragraph where it is stated that Mr. Toth's testimony describes the fact that he left certain items in the building and put certain other items in there for storage, citing pages 58 and 69 of the transcript.¹ A review of Mr. Toth's testimony on direct examination (Tr. 43-58) discloses that he identified Items 2, 3, 4, 6, 7 and 16 as being located in Building 19, while his testimony regarding Item 8, the 2300 volt substation appears to be contradictory.² There is no testi-

mony by Mr. Toth or any other witness that any article claimed by the appellant other than Item 2 was ever moved out of Building 19. Once the items were located in Building 19, we consider that the lack of testimony thereafter tends to indicate that the items remained where they were. We reject appellant's argument that the lack of direct testimony about leaving the items in Building 19 indicates that they were moved.

With respect to Items 2 and 8, the appellant asserts that they were not located in Building 19 and the testimony relating thereto is uncontradicted, citing pages 43 and 36 of the transcript. The assertion is erroneous. On page 43, Mr. Toth testified as follows:

¹ Mr. Toth's testimony at Tr. 58 is that a stone saw and a cement saw under Item 16 were located in Building 19 and that he had no occasion to take them. At Tr. 69, to explain why he did not take the equipment out before the end of the contract period, Mr. Toth stated that he took only those items he could sell or store in his building. Neither of the cited pages nor any other part of the transcript records testimony that any item of equipment was moved into Building 19 for storage by Mr. Toth.

² The following is reported at Tr. 36 on direct examination of Mr. Toth:

"Q. Now, one of the other pieces of equipment that related to this operation of the steel mill was a substation. Do you know what the voltage of this substation was?

A. Well, the various voltages that came out of it was 220, 440 and I think 2300.

Q. This substation was set off outside of the building?

A. Yes.

Q. Was it in the southwest corner?

A. Yes."

We observe that appellant's counsel previously used the phrase "in the southwest corner" to elicit a response on P. 14 as to the location of the blast furnace which was unquestionably located in Building 19:

"Q. Now, in the southwest corner is the blast furnace?

A. Yes."

Q. The second item on this list is a 60-inch champion conveyor used at railroad siding to unload. Where was this located, Mr. Toth?

A. That conveyor was situated in building 19 and then it was moved out onto the storage yard.

Q. You moved it out to the storage yard?

A. I'm not positive about that. I think we did.

No testimony was elicited as to when the removal of Item 2 from Building 19 may have taken place.

Even if we assume, *arguendo*, that the removal took place before March 3, 1971, there exists further reason for excluding the conveyor from the sale of surplus property. Mr. Fred Minnick, the contracting officer's representative at the site,

testified that the champion conveyor was not included in the sale because it was assigned to another group (Tr. 83). Mr. Toth's testimony (Tr. 20) indicates that he did not expect to get property assigned to divisions other than the Metallurgy Division which was selling the steel-making equipment.

Regarding Item 8, the 2300 volt distribution center and substation, Mr. Toth's testimony was not clear as to its location,³ while Mr. Minnick described the location as being inside the compressor room of Building 19 (Tr. 84, 88). The function of the distribution center and substation would preclude its inclusion in the contract regardless of how the conflicting testimony regarding location is resolved. The substation and distribution center furnished 220 and 440 voltage in addition to 2300 voltage according to both Mr. Toth (Tr. 36) and Mr. Minnick (Tr. 84). Mr. Minnick further testified that the center supplies power for the 440 volt crane and the 220 volt equipment in Building 19 as well as the power for Building 20. Supplying power for the hydraulic press was only one of many functions performed by the substation and distribution center and it cannot be regarded merely as equipment associated with the hydraulic press. *E. Willhoite*, ASBCA No. 17184 (July 31, 1972), 72-2 BCA par. 9607.

With reference to the items located in the compressor room of

Building 19, the appellant asserts that there was no reason on March 3, 1971 to have removed all of the items, since the compressor room was not to be used in the Environmental Research Program for which Building 19 was being converted. Although the appellant cites page 11 of the transcript as a basis for this assertion, page 11 contains no reference to the compressor room or to items therein.

In the second portion of its argument, the appellant contends that the clear intent and meaning of the contract should be determined by the action of the parties thereunder. In connection with this argument, appellant states on page 5 of its motion that "Mr. Toth was told clearly what was not to go, and he 'respected' this limitation throughout the performance of the contract (N.T. 20, 80, 81)." This statement leaves open the question of whether at the end of the contract period, the appellant no longer "respected" the interpretation of the contract in which it previously acquiesced. As indicated in the Board's original decision, the interpretation of a contract by the parties during performance and before a dispute arises is of great importance in resolving disputes involving contract interpretation. Mr. Toth's conduct after the dispute arose is not embraced within this principle and is not of primary importance in resolving disputed questions of contract interpretation.

³ See footnote 2.

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We attached no particular significance to appellant's repeated assertions in its correspondence that it suffered great financial loss in performing the contract (Appeal File, letters of April 6, 1971, May 12, 1971 and July 7, 1971 from Mr. Toth to the Contracting Officer). The Government does not guarantee a profit to purchasers of surplus property. Government surplus sales remain an area in which the maxim "caveat emptor" retains much of its former vigor. See *Standard Magnesium Corp. v. United States*, 241 F.2d 667 (10th Cir., 1957). The question is not whether the appellant suffered a loss but whether the contract can reasonably be interpreted to include the items claimed by the appellant.

The principal obstacle to inclusion of the remaining items within the contract is their remoteness from Building 19. Despite the fact that the contract specifications describe the location of the four named items and associated equipment as "installed and in place at the U.S. Bureau of Mines, Building 19,"⁴ appellant urges that the test should be whether or not the disputed items were used in connection

with the operation regardless of their distance from Building 19. Appellant asserts that the test of proximity to Building 19 was inconsistently applied because the Board's decision excludes Item 14, which was 150 yards away, while appellant removed a car shaker located one-quarter mile away. This assertion ignores the fact that the propriety of appellant's removal of the car shaker was not before the Board for decision. Since the car shaker was not the subject of a dispute, the record does not disclose the contractual basis for its removal.

Appellant did not question denial of its appeal as to Item 12, Filtration and Cooling Bed, Pipes and Pumps. This item was located "Way over the hill from Building 19" (Tr. 54) and was part of the water supply system. Appellant disputes the Board's denial of its appeal on five other items located at distances varying from 150 to 500 yards from Building 19. The testimony cited by appellant in support of its arguments will be considered for each item in turn.

Item I, Shaker, Conveyor and Crusher. The Board's original decision excludes this item on the basis of testimony that the equipment was not related to the operation of the furnaces since it was used to crush coal (Tr. 82) and coal was not used in the operation of the furnaces (Tr. 23-25). Appellant contends that this conclusion is inconsistent with the evidence in view of the

⁴ Location

The Open-Hearth Furnace, Blast Furnace, Forging Press, Pig Casting Machine and associated equipment is installed and in place at the U.S. Bureau of Mines, Building 19, Bruceton Station, South Park Township, Allegheny County, Bruceton, Pennsylvania, one mile south of Broughton, Pennsylvania. (Appeal File; Contract EAO-S-71-1, Specifications, Paragraph III).

fact that appellant's right to four small coal crushers in Building 19 was never questioned, citing pages 28 and 29 of the transcript. Contrary to this contention, Mr. Toth himself questioned his right to the coal crushers in the following testimony on page 29:

Q. Why would you remove this type of equipment?

A. Well, I don't really know. In other words, the crushers were there and we were told that we could take them.

Such a questionable taking of coal crushers from Building 19 does not establish a basis for removal of a coal crusher from an ore yard four or five hundred yards away from Building 19.

Appellant also argues that since it took a rock crusher, conveyors, motors and structural steel from the ore yard it should also receive the coal crusher, shaker and conveyor, citing pages 31 and 32 of the transcript. The testimony on page 32 indicates Mr. Toth's knowledge that the contract did not require any work in the ore yard:

Q. Does the contract specifically refer to taking down, doing any work in this area?

A. No, it doesn't. Not to my knowledge it doesn't.

Q. So the only reference to this within the contract would be under the heading associated with equipment and materials, is that right?

A. I would think so, yes.

The testimony cited by appellant provides no support for its arguments. The record as a whole shows

that Item 1 was not located at Building 19 and it was not associated with the operation of any item named in the contract. We find no reason to disturb the Board's original decision that Item 1 was properly excluded from the contract. If there is inconsistency between this finding and the evidence that other similar items were taken, it lies only in the fact that the Board was not called upon to decide the propriety of the inclusion of those other items in the contract.

Item 10, Electric hoist and cable reels. Appellant cites no specific testimony that it wishes to be reconsidered in connection with this item, so we will consider the record as a whole. Mr. Toth testified that the hoist and reels were stored in a small shed adjacent to the cooling tower (Tr. 51). They were there when he first went to look at this particular installation (Tr. 52). Mr. Toth visited the site many times in 1969 and 1970 (Tr. 8) and several times in October 1970 to look it over (Tr. 17). Mr. Toth testified that the hoist and reels disappeared—"the hoist was there and the next day or so, I don't know just when, it was gone." (Tr. 52.) Such vague and nonspecific testimony does not rule out the possibility that Mr. Toth saw the hoist and reels on one of his earlier visits and that they were gone at the time he submitted his bid.

Appellant's only argument for inclusion of the hoist and reels is that they were used in connection

COMPANY

April 30, 1974

with a car shaker located at a railroad siding a quarter of a mile from Building 19 and that the car shaker was associated with the operation of the furnaces and was inoperative without the hoist and reels.

The contractual basis for inclusion of the car shaker in a contract which describes the subject matter of the sale as located at Building 19 is not readily apparent, however, in view of its location a quarter of a mile away.

On reconsideration of the record as a whole, we find no grounds for disturbing our finding that Item 10 was properly excluded.

Items 13 and 14. 700 Ton Limestone and Pile of Coke. Here again the appellant cites no specific testimony it wishes to be reconsidered, but merely argues that because it removed some items from areas remote from Building 19, it should have these items. The Limestone was located at least four or five hundred yards from Building 19 (Tr. 17, 39) and the coke was located "maybe 150, 200 yards away" from Building 19 (Tr. 39). We again reject the argument that removal of other items from locations remote from Building 19, on a basis not explained in the record, somehow entitles the appellant to remove these two items. We find no reason to disturb our original decision that these two items were not included in the contract.

Item 15, Car Puller. This item was located at a railroad siding

"down over the hill, I would say a quarter of a mile more or less" from Building 19 (Mr. Toth, Tr. 32-33). Appellant submits that this item was used only in connection with the operations at Building 19, overlooking the testimony on page 82 that the car puller was the property of another group which used it to pull coal cars into a warehouse. The record does not contain any testimony that coal was used in the operations at Building 19. The appellant asks why would he be given the electrical equipment to operate the car puller and then be denied the puller itself, citing page 15 of the transcript. As in previous instances, the citation does not answer the question. Page 15 reports only the following testimony regarding appellant's work at the railroad siding:

Q. What specifically did you have to do at the railroad siding?

A. We took down the car shaker and all the structure and we took out the electrical equipment. There were various items down there. I believe, two motors.

No mention is made of a car puller on page 15. On page 57, Mr. Toth described the fact that the car puller was inoperative but did not say that he took out the electrical connections to it.

The answer to appellant's question is that the record does not show that he got the electrical equipment to operate the car puller. The car puller itself was not described in the contract's description of the items

being sold, it was not located where the contract described the associated equipment as being located and it was assigned to another division and used for purposes unrelated to the operation of Building 19. We find no basis for inclusion of the car puller in the contract.

For the reasons stated above, the Board rejects appellant's argument that the Board's original decision is unsupported by the record as a whole.

Decision

On reconsideration, the Board finds no reason for disturbing its original decision and that decision is hereby affirmed.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

SAM ROSETTI**15 IBLA 288**Decided *May 6, 1974*

Appeal from decision (I 7076) of Idaho State Office, Bureau of Land Management, declaring mining claim null and void ab initio.

Set aside and remanded.

**Mining Claims: Lands Subject to—
Mining Claims Rights Restoration
Act—Withdrawals and Reservations:
Power Sites**

From the effective date of the Mining Claims Rights Restoration Act of August 11, 1955, 69 Stat. 682-683 as amended, 30 U.S.C. §§ 621-625 (1970), all lands included in an application to the Federal Power Commission for either a preliminary permit or a license, where no permit has been issued, are open to mineral entry, absent other impediments.

**Mining Claims: Lands Subject to—
Mining Claims Rights Restoration
Act—Withdrawals and Reservations:
Power Sites**

The mere filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act does not preclude the operation of the U.S. mining laws as to those lands.

**Mining Claims: Lands Subject to—
Mining Claims: Power Site Lands—
Mining Claims Rights Restoration
Act**

Public lands covered by a license, or an application for a license for a power project where already covered by a preliminary permit issued by the Federal Power Commission, which permit has not

been renewed more than once in the case of such prospective licensee, are not open to mineral location.

APPEARANCES: Sam Rosetti, pro se.

*OPINION BY ADMINISTRATIVE
JUDGE FISHMAN*

*INTERIOR BOARD OF LAND
APPEALS*

Sam Rosetti¹ has appealed from a decision, dated October 19, 1973, of the Idaho State Office, which held the Buzzards Roost placer claim to be null and void ab initio. This claim, within Lots 2 and 3, section 12, T. 29 N., R. 4 W., B.M., Nez Perce County, Idaho, was located January 4, 1964, and recorded on January 7, 1964. At those times the lands within those lots, below the 1,630 feet contour, were withdrawn pursuant to the filing of an amended application for a license for Power Project No. 2273, made on August 22, 1960. The application for license was rejected by the Federal Power Commission (FPC) on February 3, 1964.² The lands were again withdrawn on October 2, 1968, by the Wild and Scenic Rivers Act (82

¹ Appellant Rosetti's appeal is entitled a protest, and states with regard to reasons that: "We claim valid entry under P.L. 359; mining in power site withdrawals." The "we" used apparently refers to some or all of the other named parties to the decision of the State Office. These were George Grasser, G.G.R.B. Mining Co., and Howard Gentry.

² This is shown by a letter from the Federal Power Commission to the Bureau of Land Management.

Stat. 906, 911, 915), 16 U.S.C. §§ 1276(a) (23), 1280(b) (1970).

In his appeal, appellant simply states that a valid entry is claimed under Public Law 359, the Mining Claims Rights Restoration Act, *as amended*, 30 U.S.C. §§ 621-25 (1970). This Act provided in part that all lands withdrawn for power development were to be opened to mineral location unless they were (1) "in any project operating or being constructed under a license or permit * * *"; or (2) "under examination and survey" by a prospective power project licensee, who held "an uncanceled preliminary permit issued under the Federal Power Act" authorizing such examination and survey, "and such permit has not been renewed in the case of such prospective licensee more than once." *Id.* at 621(a).

The customary procedure for obtaining a license to construct a power project under the Federal Power Act, *as amended*, 16 U.S.C. §§ 791a-828c (1970), includes the filing of an application for a preliminary permit with the FPC, the grant of that permit, the filing of an application for a license, and the grant of that application. In the present case, however, no preliminary permit was applied for or obtained. The record indicates that only an amended application for a license was filed on August 22, 1960, and that it was denied by the FPC on February 3, 1964.

Some recent decisions of the Board of Land Appeals speak very broadly on the issue of whether

public lands included only within an application for a license for a power project are withdrawn from mineral location under the terms of the Mining Claims Rights Restoration Act, *supra*.

For instance, in *Ralph Page*, 8 IBLA 435 (1972), the text contains the sentence that "* * * [a]t all times material here, the lands below the 1560 foot contour, having been covered by an application for a license, a license itself *or* a preliminary permit, were and remain closed to mineral location." *Id.* at 437 (emphasis on disjunctive structure supplied). The disjunctive structure was carried into the headnotes for that case, upon which the Idaho State Office apparently relied in the decision appealed by Rosetti. The headnote states:

Public lands covered by a license *or* an application for a license for a power project issued by the Federal Power Commission are not open to mineral location. (*Italics supplied.*)

If applications for either a license or a preliminary permit are filed with the FPC, what is the status of the public lands involved during the period before the FPC grants either a license or a preliminary permit?

Section 24 of the Federal Power Act (41 Stat. 1063, 1075), *as amended*, 16 U.S.C. § 818 (1970), provides:

Any lands of the United States included in any proposed project under the provisions of sections 792, 793, 795-818, and 820-823 of this title shall *from the date of filing of application therefor be reserved* from entry, location, or other disposal under the laws of the United States

until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. (Italics supplied.)

Section 4 of the same Act, 16 U.S.C. § 797 (1970), delineating the general powers of the Federal Power Commission, states:

The Commission is authorized and empowered—

(e) To issue licenses * * * for the purpose of constructing, operating, and maintaining dams, [etc.] * * *. * * * And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit * * * the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application * * *.

Thus it is clear that "applications," as used in section 24 of the Act, *supra*, include those for preliminary permits.

But the Mining Claims Rights Restoration Act, *supra*, opens to mineral location all lands withdrawn for power purposes unless within areas under examination by a permittee of the FPC. As is stated in this Act,

All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * * provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncancelled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once. (Italics supplied.)

30 U.S.C. § 621(a) (1970).

Thus, it is clear that from August 11, 1955, the effective date of the Mining Claims Rights Restoration Act, *supra*, all lands for which no preliminary permit has been issued, but which are only included in either an application for a license or an application for a preliminary permit, are open to mineral entry,³

³ We note that *Foster Mining and Engineering Co.*, 7 IBLA 299, 308, 79 I.D. 599, 604 (1972) states: "The effect of the filing of the application for a preliminary permit as to the status of public land included therein is the same as the filing of the application for a license for a proposed power project. * * * That statement is made in the context of sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970) and is correct in that context. Under the Mining Claims Rights Restoration Act, 30 U.S.C. §§ 621-25 (1970), an uncancelled preliminary permit, not renewed more than once, continues to segregate the

absent other impediments, subject, however, to the terms of that Act.

Although *Gardner C. McFarland*, 8 IBLA 56 (1972), alludes to the exclusionary effect of an application for a license when filed by the holder of a preliminary permit, another authority for this holding is found in *A. L. Snyder*, 75 I.D. 33 (1968).

In *Snyder*, the land upon which a mining claim was located in 1961 had been included in an application for a power project filed in 1953. A preliminary permit for the power project was issued in 1957, and an application for a license for the project was filed in 1959. The Mining Claims Rights Restoration Act, as already noted, became effective in 1955.

As stated in *Snyder*, *supra* at 36, the Mining Claims Rights Restoration Act, *supra*,

*** was intended to protect from mineral location land held under the conditions it describes. When those condi-

land from mining whether or not an application for license has been filed.

Foster at 7 IBLA 311, 79 I.D. 605, further states: "Because appellants' claims were located when the land was within the preliminary permit they must be declared null and void *ab initio*. The fact that notice of the application for the permit, the permit, and the application for a license was [*sic*] not made on the land office records of public land status, does not compel a contrary conclusion." *** The latter sentence simply recites the fact of non-notation; it was not intended to suggest, nor does it mean, that under the Mining Claims Rights Restoration Act, *supra*, either the filing of an application for a permit, or the filing of an application for license when no preliminary permit is outstanding would bar land from the operation of the mining laws. Both *Page* and *Foster*, recite that preliminary permits had been issued. Those decisions are therefore correct on the facts stated.

tions exist, the land is not open to mineral entry; when they do not, the land is open to mineral entry.

Thus it was found that the public lands involved were withdrawn from mineral location from 1953 to 1955, when the Mining Claims Rights Restoration Act became effective. However, when the preliminary permit was issued in 1957 the lands were again closed to mineral location, due to terms of the Act, and thus *Snyder's* location in 1961 was null and void *ab initio*.

Therefore, the mere filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act, *supra*, does not effect a withdrawal of the public lands involved from the operation of the U.S. Mining laws. Those lands, until a preliminary permit or license is issued, remain open to " * * * entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes * * * ." *Id.*⁴ It is true, of course, that the

⁴ The terms of 18 CFR 4.31 (provisions for acceptance of license applications by the Federal Power Commission (FPC)) and those of 18 CFR 4.81 (provisions for acceptance of applications for preliminary permits by the FPC) require notice of such filings to be given to the Department of the Interior "so that withdrawals from entry may be recorded."

Such withdrawals for power purposes are effective from the date of the filing of the proper application. However, as explained in this decision, these withdrawals, when made after August 11, 1955, the date of the Mining Claims Rights Restoration Act, do not preclude the lands affected thereby from the operation of the U.S. mining laws until such time as a preliminary permit or license is issued.

liability of the United States for use of the lands for power purposes is limited by section 3 of the Mining Claims Rights Restoration Act,⁵ 30 U.S.C. § 622 (1970). We also recognize that under 30 U.S.C. § 621(b) (1970), the locator of a placer mining location, such as is at issue here, "shall conduct no mining operations for a period of sixty days after the filing of a notice of location * * *." This section does not necessarily go to the question of validity of the claim.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded.

FREDERICK FISHMAN,
Administrative Judge.

I CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

⁵ Section 3 of the Act provides:

"Prospecting and exploration for and the development and utilization of mineral resources authorized in this chapter shall be entered into or continued at the financial risk of the individual party or parties undertaking such work: *Provided*, That the United States, its permittees and licensees shall not be responsible or held liable or incur any liability for the damage, destruction, or loss of any mining claim, mill site, facility installed or erected, income, or other property or investments resulting from the actual use of such lands or portions thereof for power development at any time where such power development is made by or under the authority of the United States, except where such damage, destruction, or loss results from the negligence of the United States, its permittees and licensees."

JUDGE THOMPSON CONCURRING IN THE RESULT:

We assume in this case that there was only an application for a license for a power project filed with the Federal Power Commission and that a preliminary permit or any other authorization from the Commission has never issued for the applicant to conduct a survey and examination of the lands.¹ The issue raised in this case is one of first impression; namely, whether mining claims are void ab initio when located after the Mining Claims Rights Restoration Act of August 11, 1955, *as amended*, 30 U.S.C. § 621 *et seq.* (1970), on land within a power site withdrawal, if there has only been an application for a license for a power project *and* there has never been a preliminary permit authorizing the applicant to conduct an examination or survey of the lands in the application.

All of the cases cited by the majority dealt with different questions and different factual situations and are distinguishable for that reason. In their factual context, the decisions are clear and are not in any

¹ The Chief, Bureau of Power, FPC, in a letter to the Bureau of Land Management dated January 3, 1972, mentions only an amended application for license for power Project No. 2273. He concluded in his letter that the lands were "not open to mineral location under the Act of August 11, 1955, between the period of August 22, 1960, and February 5, 1964." Judge Fishman has since been informally advised by FPC personnel that a preliminary permit pertaining to that project was never issued.

conflict with the result reached in this case.²

I agree with the majority that mining claims are not void ab initio by reason of being located on lands where there has only been an application for a license or a preliminary permit and no preliminary permit has ever been issued. I wish to emphasize, however, that lands within an application for a license or for a preliminary permit are withdrawn when the application is filed with the Federal Power Commission in accordance with section 24 of the Federal Power Act, *as amended*; 16 U.S.C. § 818 (1970), until action by the Commission or Congress opens such land to entry. *Foster Mining and Engineering Co.*, 7 IBLA 299, 79 I.D. 599 (1972). Congress, by the Mining Claims Rights Restoration Act, opened land withdrawn for power purposes to mineral entry, with certain exceptions which we conclude are not applicable here, but Congress also pro-

vided the opened land is subject to a reservation of power rights to the United States. 30 U.S.C. § 621(a) (1970). Therefore, any mining claims located after that Act on lands withdrawn for power purposes are subject to the power reservation. The lands are open to mineral location only subject to the conditions and restrictions of that Act. *See also especially* 30 U.S.C. §§ 622, 623 and 625.

JOAN B. THOMPSON,
Administrative Judge.

**ESTATE OF LINDA M. WHITETAIL
(DRUNKARD) PENN
(DECEASED CHEYENNE
UNALLOTTED)**

2 IBIA 285

Decided May 9, 1974

Petition to reopen.

Granted.

245.1.0 Indian Probate: Guardian Ad Litem: For Whom Appointed: Generally

Failure to appoint a guardian ad litem for minors in probate proceedings violates the provisions of 43 CFR 4.2S2.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

A petition to reopen, filed more than three years after the original order, will be granted where it is shown that a minor child of the deceased either through mistake, accident, or fraud was not represented at the hearing and as a result thereof was not included as an heir in the original order.

²For example, *Ralph Page*, 8 IBLA 435 (1972); *Gardner C. McFarland*, 8 IBLA 56 (1972); *Foster Mining and Engineering Co.*, 7 IBLA 299, 311, 79 I.D. 599, 605 (1972); *A. L. Snyder*, 75 I.D. 33 (1968), all concerned land status where a preliminary permit had issued. In *Page* and *Snyder* applications for a license had been filed while the permit was in existence. *Snyder* had ruled at 36 (also in *Foster* at 311) that an application for a license filed while a permit was in effect "kept the land 'under examination and survey by a prospective licensee of the Federal Power Commission' within the meaning of * * * [the second clause of the third proviso of 30 U.S.C. § 621(a)] since it was filed before the permit expired and preserved the priority of the permittee under the permit." Thus, any reference to the application for a license in *Page* was based upon the facts in that case where a preliminary permit had issued and the rationale in *Snyder*.

(DECEASED CHEYENNE UNALLOTTED)

May 9, 1974

APPEARANCES: Allen C. Quetone, Superintendent, Concho Agency, for and in behalf of Annette Lois Penn, a minor.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before this Board on a petition to reopen, dated April 3, 1974, filed by the Superintendent, Concho Agency, Bureau of Indian Affairs, Concho, Oklahoma, for and in behalf of Annette Lois Penn, a minor.

The petitioner sets forth the following reasons in support of his petition to reopen:

1. That on January 18, 1965, an order determining heirs was entered in the above estate in which it was determined that the sole and only heirs of the decedent were the surviving spouse and six children.

2. That on November 28, 1973, at a hearing in connection with the probate of Pauline Howling Crane Whitetail, deceased Cheyenne allottee No. 2966, the mother of the decedent, evidence was adduced establishing that the above decedent had an additional child, Annette Lois Penn, born on April 26, 1960. A copy of her birth certificate is attached hereto marked "Exhibit 1" and made a part hereof.

3. The said child was not adjudged to be an heir at law of the decedent in the order of January 18, 1965.

The record indicates that the child in question, who is still a minor, was not represented during the original

proceedings and as a consequence thereof, she was omitted from the Order of January 18, 1965. In the absence of any explanation for the foregoing failure and omission it can reasonably be assumed that it resulted either through mistake, accident or even fraud.

Appointment of guardians ad litem for minors in trust probate proceedings is required by the regulations, 43 CFR 4.282, and failure to do so is cause to reopen. *Estate of Aho (Florence Mammedaty)*, IA-T-8 (November 30, 1967) and *Estate of Betty May Black Garcia*, IA-P-3 (July 21, 1967).

Good and sufficient cause appearing, the petition to reopen should be granted and the matter remanded to the Administrative Law Judge for further proceedings and disposition.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Estate of Linda Whitetail (Drunkard) Penn, deceased Cheyenne unallotted, is **HEREBY REOPENED** and the matter is hereby **REMANDED** to the Administrative Law Judge with authority to appoint a guardian ad litem for the minor child, and to conduct, after due notice to all parties in interest, whatever proceedings he deems necessary in the matter and for the issuance of an appropriate order consistent with the evidence

adduced therein subject to the right of appeal by an aggrieved party.

ALEXANDER H. WILSON,
Administrative Judge.

I. CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

APPEAL OF TOKE CLEANERS

IBCA-1008-10-73

Decided *May 10, 1974*

Contract No. A00C14201814, Bureau of Indian Affairs.

Dismissed.

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

Where, under a contract to furnish laundry services which provided that the quantities of work to be done were based upon estimates and that the Government reserved the right to increase or decrease them by 25 percent, a contractor was called upon to perform work in an amount below 75 percent of the estimates, his claim to be paid for the difference between the service actually performed and the amount estimated, less 25 percent, is dismissed in the absence of contract clauses upon which the Board can provide relief.

APPEARANCES: Mr. Donald R. Hansen, Attorney at Law, Nilles, Hansen, Selbo, Magill and Davies, Ltd., Fargo, North Dakota, for the appellant; Mr. Wallace Dunker, Department Counsel, Aberdeen, South Dakota, for the Government.

OPINION BY ADMINISTRATIVE JUDGE KIMBALL

INTERIOR BOARD OF
CONTRACT APPEALS

On June 19, 1972, the appellant was awarded a contract to provide laundry service for the Wahpeton Indian School, Wahpeton, North Dakota, from July 1, 1972, through June 30, 1973.¹ Under the bid schedule the following types of laundry were to be performed: rough dry, 55,500 lbs., at the unit price of \$.15; flat finish, 50,000 lbs., at the unit price of \$.15; and hand finished or machine finished, 15,000 lbs., at the unit price of \$.75, amounting to \$27,075. The contract provided that the "quantities indicated * * * are based upon the [sic] estimates and the Government reserves the right to increase or decrease the amounts by 25%."

During the life of the contract payment for the services rendered amounted to only \$13,986.45.² On July 11, 1973, following completion of the contract period, the appellant submitted a claim for additional moneys allegedly due. It asserted that actual damages of \$11,639.76 were sustained by reason of the Government's failure to utilize fully the laundry service, but claimed only \$7,885.95 on the ground that it was restricted by the contract to recovery of the difference between \$27,075, less 25 percent, and the amount "billed

¹ The contract consists, *inter alia*, of Standard Forms 32 and 33 (November, 1969 edition) with Specifications for Laundry Services.

² Department counsel's letter, dated April 4, 1974. In the Contracting Officer's Findings of Fact and Decision, dated October 2, 1973 (Exhibit 2, Appeal File), the total amount shown as having been paid to the appellant, \$12,420.30, is apparently understated.

May 10, 1974

through 30 June."³ The claim should be further reduced to \$6,319.80, to reflect payments made to the appellant after June 30, 1972.

The Contracting Officer denied the claim on the ground that the appellant was limited to payment for the actual service rendered.⁴ He characterized the contract "as an indefinite quantity type * * * used when it is impossible to determine in advance the exact quantities that will be needed during the contract period." Accordingly, he held that the quantities shown in the contract were only estimates made in good faith, based upon an anticipated enrollment at the Wahpeton School which was not reached.

He found that "the contract more or less sets forth the estimated requirements and specifications but is not the basis for actual performance." In his view, "[p]urchase orders placed against the contract during the contract period are the

basis on which the Contractor performs and payment is made."⁵

Following the appellant's appeal to the Board from the Contracting Officer's decision, the Government raised in its answer the question of our jurisdiction over the subject matter. In urging us to retain the case the appellant cites paragraph (b) of the Disputes clause under which boards are empowered to decide questions of law.⁶

The Disputes clause alone, however, does not give a board authority to provide relief.⁷ In addition there must be present in the contract appropriate clauses containing adjustment provisions applicable to the matter in dispute.⁸

As we understand the Government's position, the quantities set forth in the bid schedule are without any effect except as figures which bidders might employ so as to make realistic quotations. It would follow that the Government was under no obligation to order any laundry service from the appellant at any time during the term of the contract. Moreover, the contract contained a clause by which

³ Exhibit 1. The actual damages incurred allegedly consisted of \$1,695 for training its personnel to learn accounting and supervision; \$650 for a truck driver's wages; \$5,280 (still unpaid) for "not being able to make equipment payments * * * to St. Luke's Hospital for ironer and folder * * *"; \$1,796.76 for leasing of truck; \$400.40 for gas and truck repair through December 1972; \$476 resulting from processing work in Fergus Falls instead of Fargo; \$650 for "drivers time deadheading from Fargo to Fergus empty * * *"; and \$691.60 for gas and maintenance through June 1973. As mentioned in the text accompanying note 2, *supra*, it appears that the appellant was actually paid \$13,986.45.

⁴ Exhibit 2.

⁵ Following the printed statement "Payment will be made by" at No. 27 of Standard Form 33 of the contract, this language appears: "To be shown on purchase order issued under this contract."

⁶ Clause 12, Standard Form 32.

⁷ *Manpower, Inc.*, GSBGA No. 3622 (November 29, 1972), 73-1 BCA par. 9792.

⁸ *Christy Corp.*, IBGA-461-10-64 and 569-5-66 (June 20, 1966), 66-1 BCA par. 5630; *Charles Blount d/b/a J. Service & Supply*, GSBGA No. 3725 (August 31, 1973), 73-2 BCA par. 10,225.

the Government had the right unilaterally to cancel the agreement on twenty days' written notice. Such an agreement lacks mutuality and would be unenforceable to the extent it had been unperformed.⁹

The contract here, of course, has been completed, and we do not believe it should be interpreted as the Government has. At the outset the position can be taken that the quantities stated are not necessarily estimates. They are "based upon * * * estimates," but we are by no means certain that quantities based upon estimates and estimated quantities are precisely the same. In any event this is not the traditional type of agreement to supply whatever quantities of an article or service the Government may require in which substantial variations from the estimate of quantities do not entitle a contractor to relief unless the Government acted in bad faith.¹⁰ In that case the Government's needs and not the variable estimates are controlling.¹¹

As the Contracting Officer himself recognized in his Findings of Fact and Decision, here the contract provides for the furnishing of laundry services "within stated maximum and minimum limits." The Government reserved the right "to increase

or decrease the amounts by 25%." The Government thus bound itself not to exceed a 25% variance from the estimated quantities, which is not the same as saying that an estimated quantity *may* vary.¹² Here we have an express limitation on permissible deviations.

In our view the Government was obligated to utilize the appellant's services within a range of 25 percent of the estimated quantities.¹³ The Government was not legally free to reduce its laundry needs beyond the 25 percent limit, whether the contract is, as the Contracting Officer determined, of the "indefinite quantities" type or not.¹⁴ The provision for the issuance of purchase orders, cited by the Contracting Officer, relates only to how payment is made and does not restrict or render ineffectual the provision governing quantities.

There are, however, no provisions in this contract under which relief may be afforded the appellant by the Board. In similar situations where

¹² *Id.*

¹³ See *Johnstown Coal & Coke Co. v. United States*, 66 Ct. Cl. 616, 621 (1929), in which the Court held: "Under the plain terms of the contract defendant was obligated to take the estimated quantity unless the actual requirements demanded a less quantity, and in that event, only to the extent of fifty per cent less than the estimated amount."

¹⁴ See 41 CFR Sec. 1-3.409 (1971) (indefinite delivery type contracts). Despite the presence of an "Indefinite Quantities" clause which stated that the total contract quantities were estimates only, the Court of Claims has held that a one-year contract for printing weekly issues of a newspaper was a requirements-type contract obligating the Government to purchase its printing needs from the contractor. *Neil A. Goldwasser d/b/a Century Offset Company v. United States*, 163 Ct. Cl. 450 (1963).

⁹ *The Tennessee Soap Company v. United States*, 130 Ct. Cl. 154 (1954), citing *Willard, Sutherland and Company v. United States*, 262 U.S. 489 (1923); *Sanz School of Languages*, ASBCA Nos. 9571 & 9572 (May 28, 1964), 1964 BCA par. 4257.

¹⁰ *Machlett Laboratories, Inc.*, ASBCA No. 16194 (February 21, 1973), 73-1 BCA par. 9929.

¹¹ See *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 546-47 (1960).

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orders placed under requirements contracts have fallen short of the estimates, boards have grounded relief under the Termination for Convenience clause when a lack of good faith in making the estimates has been found.¹⁵ Here the Government's *bona fides*, in arriving at the estimates is not in issue. Having been based on anticipated enrollment approximately three months prior to the opening of school,¹⁶ we regard the Government's estimate of laundry needs as made in good faith and in the exercise of reasonable care.

In any event, in this case the contract lacks a Termination for Convenience clause. While the *Christian*¹⁷ doctrine requires that certain mandatory clauses be deemed incorporated into a contract by operation of law, there is no requirement that the Termination for Convenience clause be so included here. As the Armed Services Board of Contract Appeals recently held: "Incorporation of a clause into a contract by operation of law is an extraordinary action and should be undertaken only under extraordinary circumstances. We fail to per-

ceive such circumstances here."¹⁸ By virtue of the nature of the agreement, inclusion of the clause is not made mandatory under the Federal Procurement Regulations.¹⁹ Inasmuch as a "cancellation" clause was included, the failure to incorporate a Termination for Convenience clause, as well, was, in our view, deliberate and within the discretion vested in the procuring agency by the FPR. Accordingly, for these reasons, the Termination for Convenience clause is not an available avenue of relief to the appellant.

Relief is also not available to the appellant under the Changes clause, which is the only clause in the contract containing an adjustment provision. In some instances where the Changes clause of a contract has been broad enough to permit changes in quantity it has been utilized by a board for adjustment purposes in claims of this nature.²⁰ Here, however, the Changes clause only authorizes "changes, within the general scope of [the] contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii)

¹⁵ *G. F. Plitt & Son, Inc.*, ASBCA NO. 16997 (April 27, 1973), 73-2 BCA par. 10,049; *Henry Angelo & Sons, Inc.*, ASBCA No. 15082 (February 29, 1972), 72-1 BCA par. 9356. The burden of proof to show a lack of good faith in estimating requirements by a buyer is upon the seller. *Machlett*, note 10, *supra*.

¹⁶ Exhibit 2. The anticipated enrollment was 416 for the school year. The actual enrollment at the beginning of the school year was 347 and at the end of school, 253.

¹⁷ *G. L. Christian & Associates v. United States*, 160 Ct. Cl. 1, *cert. denied*, 375 U.S. 954 (1963).

¹⁸ *Chamberlain Manufacturing Corporation*, ASBCA No. 18103 (October 18, 1973), 74-1 BCA par. 10,368, at 48,962, footnote reference omitted.

¹⁹ 41 CFR 1-8.700-2(d).

²⁰ *Escalante Garden Apartments, Inc.*, ASBCA No. 10287 (October 6, 1965), 65-2 BCA par. 5125; *Alamo Automotive Services, Inc.*, ASBCA No. 9713 (July 31, 1964), 1964 BCA par. 4354.

place of delivery.”²¹ The clause makes no provision for an equitable adjustment of the price resulting from changes in quantity such as occurred in this case.²²

We are therefore unable to provide any relief to the appellant under the contract. No useful purpose would be served by holding a hearing, as requested by the appellant.²³

Accordingly, we hold that appellant's claim is grounded on breach of contract over which the Board has no jurisdiction and it is therefore dismissed. Appellant's remedy must lie elsewhere.²⁴

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

²¹ Clause 2, Standard Form 32, note 1, *supra*.

²² *Shader Contractors, Inc.*, ASBCA Nos. 3957 and 4276 (January 8, 1958), 58-1 BCA par. 1579, at 5697; *Frank Joy*, ASBCA No. 3484 (November 29, 1956), 56-2 BCA par. 1100. See *Del Rio Flying Service*, ASBCA No. 15304 et al. (February 23, 1971), 71-1 BCA par. 8744, at 40,600.

²³ “We have recognized that an overt change affecting some fixed standard or minimum quantity upon which the original rates were pegged, as distinguished from a mere failure to use, may result in a compensable change under a requirements contract, if as the possibility exists, the change increases the costs intended to be recovered in the unit prices established under such a contract.” (Italics supplied.)

²⁴ See *Bateson-Cheves Construction Company*, IBCA-670-9-67 (October 8, 1968), 68-2 BCA par. 7289; *Lloyd E. Tull, Inc.*, IBCA-574-6-66 (February 15, 1967), 67-1 BCA par. 6137.

²⁵ *Myosook H. Whitcomb*, ASBCA No. 12744 (January 16, 1969), 69-1 BCA par. 7473. The Contracting Officer's authority in breach of contract claims exceeds that of the Board. *James Know, d/b/a JaK Enterprises*, IBCA-684-11-67 (February 13, 1968), 68-1 BCA

UNITED STATES V. LELAND J. CUNEO ET AL.

15 IBLA 304

Decided May 10, 1974

Appeal from decision of Administrative Law Judge Graydon E. Holt in Contest Nos. S-5080, and S-5081, declaring the Gary millsite claim and the Donna millsite claim null and void.

Affirmed.

Administrative Authority: Estoppel—
Administrative Practice—Contracts:
Generally—Federal Employees: Au-
thority to Bind Government—Mill-
sites: Generally—Mining Claims: Con-
tests—Mining Claims: Millsites—
Withdrawals and Reservations:
Generally

Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application.

Millsites: Generally—Mining Claims:
Determination of Validity—Mining
Claims: Millsites—Withdrawals and
Reservations: Effect of

The filing of a withdrawal application by the National Park Service segregates the land from mining location, and in a contest against millsites within the segregated area requires a claimant to show

par. 6854 (citing *Cannon Construction Company, Inc. v. United States*, 162 Ct. Cl. 94, 102 (1963)).

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that millsite claims are valid as of the application date.

Millsites: Generally—Mining Claims:
Millsites—Rules of Practice: Ap-
peals: Burden of Proof

After the Government has made a prima facie case of invalidity, a millsite claimant has the burden of establishing the validity of his claim by a preponderance of the evidence.

Millsites: Generally—Mining Claims:
Determination of Validity—Mining
Claims: Millsites

An objective standard of reasonableness will be applied to determine whether a millsite claim is invalid because of the nonuse of a mill structure which had been used in the past.

Millsites: Generally—Mining Claims:
Millsites

Where a mill had not been used for more than a decade prior to a withdrawal application, the mill was then not operable without more than nominal startup costs, the sources of ore for mill feed were questionable, and a proposed mining and milling operation was economically infeasible, the nonuse of the mill was more than a reasonable interruption in a milling operation, and a millsite claim containing the mill structure will be declared invalid under either clause of the millsite law.

Millsites: Generally—Mining Claims:
Millsites

A millsite that is not being used, and which contains no improvements or other evidence of good faith occupation, is properly declared invalid; nor can it be validated on an expectation of future use alone.

APPEARANCES: Mark C. Peery, Esq., of San Francisco, California, for ap-

pellants; John McMunn, Esq., Office of the Solicitor, United States Department of the Interior, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

*INTERIOR BOARD OF
LAND APPEALS*

Leland J. Cuneo and Anna Josephine Garibotti have appealed from a decision of the Administrative Law Judge dated March 8, 1973, declaring the appellants' Donna and Gary Millsites null and void. The claims are in section 18, T. 3 S., R. 20 E., M.D.M., in Mariposa County in the Merced River Canyon, near the west entrance to Yosemite National Park. These adjoining claims were located in 1954, amended in 1958, and amended again in 1962.

These proceedings were initiated by the Bureau of Land Management (hereinafter BLM) at the request of the National Park Service (hereinafter NPS) through complaints filed on March 24, 1972, against each claim. Each of the complaints alleged that "the claim is not presently being used for mining or milling purposes." In April the contestees answered. They did not expressly deny that the claims were not presently being used for such purposes. However, they asserted that the claims are valid, and they recited past usage of the sites, the improvements thereon, and their plans for use of the sites in support

of this assertion.¹ The hearing was held before Administrative Law Judge Holt December 21, 1972.

At the hearing, the parties explored three main areas of concern: the history and use of the millsites for tungsten processing, the fluctuation of the tungsten market, and the contestees' efforts to locate ores in order to resume operations within the constraints of that market. In a decision dated March 8, 1973 the Administrative Law Judge declared the Gary and Donna millsite claims null and void. He found that as of the date of a withdrawal application on May 3, 1972, the millsites were not being used and occupied for mining and milling purposes. He concluded that in the fifteen years since the Gary mill was used:

¹ The complaint in this case was inartfully drafted. However, the contestees' answer did not object to the adequacy of the complaint, but affirmatively asserted the validity of the millsites. As the decision will show, the hearing proceeded and both parties introduced evidence on the issues of present use of the millsites, occupancy of the sites, and the past and prospective use of the sites. Counsel for contestees acknowledged that use and occupancy were at issue at the hearing. (Tr. 154.) He has raised no objection regarding adequacy of the complaint in this appeal. There has been no assertion of surprise, inadequate notice, lack of opportunity to prepare, or any failure of administrative due process due to the inartfully drafted complaint, nor does the record show contestees were prejudiced in any way by insufficient notice. The complaint, therefore, does provide an adequate basis for decision. *Harold Ladd Pierce*, 75 I.D. 270, 275-76 (1968).

Even if we were to assume *arguendo* that the complaint was subject to a timely objection for failure to make an adequate charge, the contestees failed to do so. Their presentation of evidence and statement of the issues to include occupancy of the millsite and past use of a mill upon the Gary millsite claim constitute a waiver of any objection to the complaint. See *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1959); *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

* * * the mill has deteriorated and will require improvements costing from \$7500 to \$15,000 to restore it. Before spending this sum of money it would be prudent to block out sufficient ore to determine whether this cost could be recovered and a profit made.

He noted that a mine from which contestees hoped to obtain ore for the mill had been reopened, and the contestees' operator had reported hearsay values sufficient to justify reopening the mill, but the Judge concluded:

[T]his was accomplished months after the mill sites had been withdrawn from location. As of May 3, 1972, the mill was not being used and whether it would be used again in the near future was highly speculative. At that time the mining claimants had nothing more than a vague intention to use the sites.

This intention to use the sites in the future is not sufficient to comply with the requirements of the mill site law.

In their appeal, contestees assert that the Judge's decision was based on a misconception of the millsite law, namely, that the validity of a millsite depends on its being "used" for mining or milling purposes. They assert that a millsite may be valid if it is "occupied" for mining or milling purposes. They contend these millsites are occupied within the meaning of the law because of the existence of the Gary mill, a substantial improvement on the Gary millsite. This conclusion, they argue, is supported first by the use of the mill from 1955 through 1958, and second by the continuing good faith intention of the contestees to resume operations as soon as the tungsten

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market and the quality of their ores justify resumption.

Contestees have asserted two alternative arguments which they maintain require the dismissal of the contest against their millsite claims. They argue that exhibits and testimony introduced at the hearing (Exs. C-6 through C-11, Tr. 114) demonstrate the existence of a contract entered into by the contestees and the NPS in 1962. The NPS allegedly promised not to contest the Donna and Gary millsites in exchange for: (1) quitclaim deeds to the Government for four other unpatented millsite claims owned, in whole or in part, by the contestees; and (2) amendments to the existing location of the Gary and Donna millsites so that the Park Service could more conveniently use the surrounding area in the Yosemite National Park Administrative Site. Contestees argue in the alternative that if this evidence does not constitute a contract it suffices to estop the Government to deny that it made such a promise.

We shall consider these latter arguments first. Public Land Order No. 2136, 25 F.R. 6210 (1960), withdrew the lands immediately around the instant millsites for use by the NPS. In order for the millsite locations to be amended so they would not conflict with the withdrawal, the NPS requested the BLM to restore to location under the mining laws the withdrawn lands which would comprise part of the adjusted claims. The Assistant Secretary, at

BLM's request, issued Public Land Order No. 2595, 27 F.R. 831 (1962), so modifying Public Land Order No. 2136 to allow the relocation of the Gary and Donna millsites.

It is in light of this restoration and relocation that the transactions between appellants and the NPS must be viewed. In the letter which most strongly supports claimants' position (Ex. C-7), the Assistant Superintendent of Yosemite National Park wrote Mr. Cuneo regarding the request to the BLM:

The restoration from withdrawal will be on an indefinite basis, that is, no time limit so that you will have ample opportunity to amend the Donna and Gary mill sites to conform with the enclosed meets [*sic*] and bounds description and subsequently to patent them.

The claimants contend that this language, and assurances contained in another letter which was "lost" and thus not introduced into evidence (Tr. 114-15), constituted a promise by the Park Service not to contest the millsite claims. (Tr. 110-11, 114-15.) We construe the Exhibit C-7 language differently. At most, NPS personnel said that the restoration period would be "indefinite," not "permanent" as the claimants argue. The length of this indefinite restoration would be defined by the period of time that would provide "ample opportunity" to file a relocation notice and subsequent patent application. The claimants therefore had the use of the amended sites and certain portions of the old sites excluded from the relocation (Ex. C-8) during this period.

Assuming *arguendo* that this letter and other oral and written communications between appellants and the Park Service constituted an agreement not to contest the claims, the question is whether the ten years between this agreement and the filing of the contest complaint was "ample opportunity" for the claimants to amend the millsite locations and file for patent. The parties recognized that it was impractical to set a fixed date for termination of the restoration, and they did not contemplate that a patent application would have to be filed with the relocation notice. However, it does not take ten years to prepare a patent application. The claimants had more than ample opportunity to file in the years prior to initiation of the contest. Therefore, even assuming such an agreement, it appears that it was fulfilled by the NPS within any reasonable construction thereof. However, the transactions do not support the existence of any definite, binding agreement not to contest and never to withdraw the land. Instead, they merely reflect negotiations between the Park Service and the claimants regarding the claimants' possessory interests during 1960 through 1962, and adjustments to areas previously withdrawn for use as part of the Yosemite Park administrative site.

The appellants' argument that, in the absence of a contract, the Park Service is estopped to deny a promise not to contest, fails also. Again assuming estoppel could be applicable, *i.e.*, if the Superintendent of

Yosemite Park had the authority to bind the United States by such a promise (*but see* 43 CFR 1810.3(b), *codifying Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *United States v. Stewart*, 311 U.S. 60 (1940)), and if the claimants suffered detriment by relying on a promise, the estoppel would apply only to the promise made by the NPS, as construed above. Appellants seek to estop the United States from *ever* contesting the millsite claims, when the NPS only asserted that it would hold open the 1962 restoration long enough to give the appellants "ample opportunity" to relocate and file for patent. The NPS did so in waiting ten years to contest the claims and file a withdrawal application for the land. The NPS has fulfilled the promise appellants would estop the United States to deny. Therefore, appellants' reliance on the estoppel doctrine fails. Furthermore, claimants have not proved that the claims they relinquished were, in fact, valid claims at the time. The Government disputes that they were, but no evidence establishes the fact. Claimants have not shown any detriment to them caused by their failure to file patent applications in reliance on any promise or conduct of the NPS. The contest against the amended claims is not subject to dismissal because of the alleged agreement or any estoppel theory.

In any event, the transactions between the parties do not evidence a guarantee that a patent application,

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if filed, would be immune from a determination by the BLM as to whether the requirements of the law had been fulfilled by the claimant. The BLM has such a responsibility. 43 CFR 3864.1. Even where a mining claim was once upheld, this Department was not barred from bringing adverse proceedings against the claim when a patent application was filed. *United States v. Webb*, 1 IBLA 67 (1970). This Department has the duty to assure that full compliance with the laws has been achieved to protect the public interest in the public lands. *Cameron v. United States*, 252 U.S. 450 (1920); see also *Utah Power & Light Co. v. United States*, *supra*. The filing of a patent application is not a prerequisite, however, for institution of contest proceedings to determine the validity of such a claim. This Department has authority in the absence of a patent application to contest the validity of a millsite. *United States v. Dean*, 14 IBLA 107 (1973); *United States v. Polk*, A-30859 (April 17, 1968).

We turn now to the issue of the validity of the claims under the mining law. In making this determination in this case, time is a significant factor. On May 3, 1972, the NPS filed an application with the BLM's California State Office to withdraw the land from mining location, pursuant to 43 CFR 2351, as part of its development plan for the El Portal Administrative Site of Yosemite National Park. (Tr. 27.) The NPS plans to use the contested

sites for a sewage treatment plant and a warehouse. (Tr. 35.)

Under 43 CFR 2351.3, the effect of this withdrawal application was to segregate the public land from mining location, and to require the contestees to show that the millsite claims were valid as of the date of the segregation. *United States v. Werry*, 14 IBLA 242, 81 I.D. 44 (1974); *United States v. Polk*, *supra*. See *United States v. Henry*, 10 IBLA 195 (1973); *United States v. Gunsight Mining Co.*, 5 IBLA 62 (1972).

The facts concerning use of the improvements on the sites are crucial in determining whether the claims were valid as of the date of the withdrawal application. Mr. Cuneo testified that while the Federal Government had a price support program for tungsten during the early and mid 1950's, he investigated tungsten mining properties and located a mining claim and the two nearby millsites in order to be able to sell tungsten to the Government at a much higher price than the general market. (Tr. 84-85.) He testified that the Gary mill, a structure situated on the Gary millsite, was built in 1954-55 at a cost of \$80,000. (Tr. 102.)

From May 1955, when it was completed, through 1958, after the Federal Government terminated its tungsten price support program, the Gary mill processed 3,200 tons of tungsten scheelite ore and 500 tons of custom gold ore. (Tr. 104, 108.) Since 1958 the mill has not been operated, but occasional repairs have

been made, including \$5,000 spent repairing windstorm damage in 1965. (Tr. 123.) At the time of the withdrawal application, the Gary mill was not operable. The testimony indicated that between \$7,500 and \$15,000 would be needed in order to put the mill in operating condition. (Tr. 11, 53.) During the brief time the Gary mill was operated the adjoining Donna claim was used to store tailings from the mill on the Gary claim. (Tr. 108.) A water pumping plant was also constructed and operated on the Donna. Most of the tailings were removed for use by contractors as heavy fill, and the evidence failed to disclose how much, if any, was still on the claim. (Tr. 108.) The last tailings were deposited on the claim in 1958. Similarly, the pumping plant was not used after 1958, and the evidence indicates that it is no longer on the claim. (Tr. 105.)

Since 1958, there has been no use whatsoever made of the Donna mill-site. There is no evidence that any improvements remain on the site. Likewise, there has been no use of the Gary millsite other than as the situs of the Gary mill structure, which has not been used since 1958.

From Mr. Cuneo's testimony it appears that the nonuse of the mill-sites was due to two factors. One, he did not have a source of tungsten ore to process through the mill. As he stated:

The problem was, all the experts we hired were all wrong. The vast tonnage they gave us wasn't there, so we had to go out and look for more ore.

(Tr. 138.) Two, the market conditions were not favorable. His production of tungsten from his mining properties ended in 1957 because of the cessation of the Government support program. As stated by Mr. Cuneo:

Government prices dropped from \$60.00 a unit to \$55.00. Congress extended our buying contract from '56 to '58, but they only appropriated enough funds to carry us through '56. The succeeding Congress in January refused to put up money, and the market dropped to \$15.00 a unit and every mine in the United States was out of business except two.

(Tr. 21.) After 1957 the market for tungsten was depressed, although beginning in 1967 the market price gradually increased to \$39 per unit² on the world market. It slumped again in 1972 to \$33. (Tr. 134, 151.) Since 1968, the Government has attempted to sell for \$43 per unit some of the surplus stockpile it acquired for \$60. (Tr. 21.)

Appellants contend that they now have a source of tungsten ore to process in the mill, and that it can be mined and milled profitably. The only support for this conclusion is Mr. Cuneo's testimony. His new sources are two mines, the June B and Tin Bucket, which he has under lease. They have not been in operation since the 1950's. Nevertheless, he believes there is enough ore to

² These prices are based upon the standard short ton unit—20 pounds of WO₃ (tungsten trioxide) in a concentrate which meets the market standards, usually 65% WO₃. (Tr. 19.) There was no information in this record concerning the quality of the concentrate produced from the mill, although it was assumed that it would meet market standards as to percentage of tungsten.

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start up an operation because engineering reports indicated there were from 1,500 to 2,500 tons of commercial ore in sight in the June B mine. (Tr. 13-15.)

Testimony by Mr. Cuneo that a profitable mining operation could be conducted using the June B mine and the Gary mill was controverted by testimony of the Government's experts. One of the Government's experts testified that he examined the mine and took assays of the tungsten ore, but that none of the ore assayed as high as one percent. Mr. Cuneo testified that assays from the mine showed two percent ore and that there was some three percent ore. No assays were submitted, however. The higher percentage ore is essential for a profitable operation.³ The Government mining engineer testified that not only were the mines not sources of ore for the millsite, but they were approximately 50 and 70 miles from the millsites (Tr. 61), over semi-mountainous terrain, and were inaccessible for four to six months each year due to adverse weather conditions. (Tr. 62.) Mr. Cuneo estimated the distances to the June B and the Tin Bucket at 42 and 45 miles, respectively. (Tr. 16.) As the Judge found, the nearest market for the

milled material was 120 miles from the millsites reached by a mountain road through Yosemite National Park that is closed by weather conditions about half the year. (Tr. 63.) The next closest market place was 210 miles from the millsites, also over mountain roads. (Tr. 63.)

The Government witness' testimony that the June B mine was not in working condition was uncontroverted. At the time of the hearing no effort had been made to clean up the mine to prepare it for mining operations, which Mr. Cuneo estimated would cost \$15,000. (Tr. 15.) He testified he had planned to begin operations in 1971 but due to health problems he was unable to manage the Work. (Tr. 126.) In 1972 he contracted to transfer the contestees' interests in the mine and the millsites to one Earl Williams, who did not mine because of access restrictions imposed by the Forest Service due to a high fire hazard that summer. (Tr. 127.) Although Mr. Cuneo testified that he could have profitably operated the mine and the millsite prior to the withdrawal, the significant fact is that in 1971, when, as he testified, his health prevented him from doing physical work, the market for tungsten had slumped from 1969, its highest peak since the artificially high price created by the Government's purchase program in the 1950's.

The record supports the Judge's finding that at the time of the withdrawal the millsites were not in use, and whether they would be used in the future was mere speculation.

³ Mr. Cuneo's testimony set his costs as \$30 to \$40 per ton of ore, depending on which mine he used and whether he was selectively mining. (Tr. 64, 20.) One percent ore milled at 100% efficiency produces one short ton unit per ton of ore. Thus, in order to break even at a market price of \$33 per short ton unit, contestee would have to be able consistently to mine better than 1% ore (Tr. 19, 83), since his mill, although well-designed, achieves only 80% recovery. (Tr. 94.)

The fact no efforts were made to use the millsites during a period when market conditions were as favorable, if not more so, and labor costs undoubtedly less than at the time of the withdrawal, raises an inference that if a prudent man did not conduct a mining operation for tungsten prior to that time because of economic conditions, he would not do so thereafter, when conditions were no more favorable.

The use of the Gary mill for ore other than tungsten was very limited. There is nothing in the record to show that it could have been profitably operated as a custom mill for other minerals during the time in question, or that there was any effort made to use it for other minerals except for the 500 tons of custom gold ore milled in 1958, after the tungsten market dropped.

The Gary mill was used intermittently during a four-year period, but it had not been used for more than ten years when the application for withdrawal of the land was filed. It was not operable at that time without expenditures varying from nearly ten to eighteen percent of the original cost of the mill, or from five to ten percent of an estimated replacement cost. (Tr. 102.) Opinions on whether the mill could be profitably used again in the near future differed between the claimant and the Government's witness. We find the probability of profitable operations to be very doubtful.

Were the millsites properly declared invalid under these circum-

stances? Section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1970), which authorizes the issuance of millsite patents, states in pertinent part:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith * * *. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

At the hearing appellant's attorney posed the issue thusly:

The initial question, of course, Mr. Hearing Examiner, is whether the claims have been used or occupied for mining and milling purposes under the statute.

(Tr. 154.) In this appeal, he repeats assertions which were also made at the hearing, namely, that where a mill has been built on the claim and used, there must be a finding that the millsite has been abandoned in order to invalidate the claim. The only other ground, he contends, is a lack of good faith. He asserts that Mr. Cuneo has not abandoned the structure, nor the claims, and has exercised good faith.

Abandonment and a lack of subjective good faith, however, are not the only grounds for invalidating a millsite which has once been used for milling purposes.

The millsite provision is a part of the general mining laws and must be considered in accordance with those laws. *United States v. Werry*,

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supra; *Robert C. LeFavre*, 13 IBLA 289 (1973); *Eagle Peak Copper Mining Co.*, 54 I.D. 251 (1933). Thus, it has been held that when the Government has made a prima facie case of invalidity, a millsite claimant, like a mining claimant, has the burden of establishing the validity of his claim by a preponderance of the evidence. *United States v. Swanson*, 14 IBLA 158, 81 I.D. 14 (1974). See *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

To determine whether a mining claim has been validated by a discovery of a valuable mineral deposit, the test has been objective—what a prudent man would do—not what the claimant himself would or wants to do. *Chrisman v. Miller*, 197 U.S. 313, 322 (1905); *United States v. Harper*, 8 IBLA 357, 367, 369 (1972); *United States v. Melluzzo*, 76 I.D. 181, 192 (1969), *set aside and remanded on other grounds*, 77 I.D. 172 (1970). In other words, although a mining claimant might testify that he hopes to develop a profitable mine, if the facts known at that time show that the costs of a mining operation will exceed expected returns for minerals from a mining claim, so that a prudent man could not by investing his money and time expect to develop a profitable mine, the requirements of the law have not been satisfied. *Castle v. Womble*, 19 L.D. 455, 457 (1894), approved in *Chrisman v. Miller*, *supra*; *Cameron v. United States*, *supra* at 459.

In ascertaining whether a claim-

ant under the millsite law has satisfied the statutory requirements, an objective standard is also required to assure that the purposes of the law are met. Thus, in *United States v. Swanson*, *supra*, this Board held that the millsite claimant may be required to demonstrate use or occupation of all the area claimed before he will be granted a patent for the full acreage located. In that case, although the claimant testified he needed all of the acreage within a number of different millsites, the Board looked at the facts objectively and concluded that less than the five-acre statutory maximum per millsite was allowable.

In this case, if the claimant cannot show by objective criteria that the millsite claim was valid at the time of the withdrawal application, the millsite properly may be declared invalid. *United States v. Werry*, *supra*. The concept of time also comes into play in considering the nonuse of the millsites. It has long been recognized under the mining laws that a claimant may not perpetually encumber the public lands without fulfilling the purposes of the mining laws. Even where a mining claimant might once have had a valid claim, if he fails to carry his claim to patent he takes the risk that when he finally applies for a patent and the claim is contested, or if the claim is contested in the absence of the patent application, the claim will no longer be found to meet the requirements of the law and will be held invalid. *Best v. Humboldt*

Placer Mining Co., 371 U.S. 334, 336 (1963); *Mulkern v. Hammit*, 326 F.2d 896, 898 (9th Cir. 1964). This principle is applied to mining claims where the mineral on the claim has been exhausted, or where the market for the mineral has been lost. *Mulkern v. Hammit*, *supra*; *United States v. Adams*, 318 F.2d 861 (9th Cir. 1963); *United States v. Estate of Alvis F. Denison*, 76 I.D. 233 (1969); *United States v. Houston*, 66 I.D. 161, 165 (1959); *United States v. Logomarcini*, 60 I.D. 371, 373 (1949).

Likewise, a millsite that might once have been valid can lose that validity. In *United States v. Skidmore*, 10 IBLA 322 (1973), this Board held that past use of a claim for mining purposes was not sufficient where the occupancy was not maintained. In *United States v. Wedertz*, 71 I.D. 368 (1964), it was held that planned future use for mining purposes was not sufficient where, although improvements were on the site, present use was merely for prospecting activities. These cases determined the validity of millsites under the first clause of the millsite statute, which expressly requires use or occupancy for mining or milling purposes. However, the requirement of use or such occupancy as evidences an intended use in good faith for milling purposes is inherent in the second sentence concerning the existence of a quartz mill or reduction works. See *Charles Lennig*, 5 L.D. 190, 192 (1886).

The fact a custom mill has been used in the past has significance,

but that fact alone does not serve to perpetuate the validity of a millsite. Even if the claimant's good faith is not at issue, he may not be considered the "owner of a quartz mill or reduction works" within the meaning of the statute merely because he used a mill on the site in the past. Clearly, if a custom mill is removed from a claim or is rendered unusable because of fire or other destructive force as of the time of withdrawal, we would not hold that because the owner of the mill used it on the land in the past, he is still entitled to a patent.⁴ Where a mill was so dilapidated that it could not be repaired, it has been held that the structure on the millsite was insufficient occupation of the claim for milling purposes. *United States v. Skidmore*, *supra*.

In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether

⁴ Where public land laws require a certain type of improvement on a claim at final proof or other determinative date, the fact an improvement may once have been upon the site is not sufficient. For example, under the Mining Claims Occupancy Act, 30 U.S.C. § 701 *et seq.* (1970), there must be valuable improvements on the claim. In one case a cabin burned down before the crucial time. A temporary trailer was placed on the land, but that was held insufficient to meet the requirement of the law even though the claimant asserted he intended to rebuild the cabin. *Stanley O. Haynes*, 73 I.D. 373 (1966). Likewise, even though an improvement may still exist upon a claim, if essential equipment has been removed from the structure, or because of disrepair it is no longer suitable for the purpose for which it was built, the requirements of the law are not met. In *United States v. Nelson*, 8 IBLA 294 (1972), decision upheld *sub nom.* *Nelson v. Morton*, Civil No. A-3-73 (D. Alaska, December 21, 1973), a house was held no longer habitable so as to meet the requirements of the homestead law.

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the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill;⁵ the marketing conditions; costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site. Because these and other factors vary from case to case, we cannot establish a definite period of nonuse applicable to all cases which would cause the site of a custom mill to lose its validity. We suggest, however, one example of acceptable nonuse. If a mill at the time of a withdrawal or contest was not in operation because bad weather, or work stoppage caused by other short-term circumstances briefly interrupted the flow of ore to the mill, and further operation was clearly expected because of available sources of ores and commitments for the milling work, with only nominal startup costs necessary to proceed with the milling, the basic character of the structure as a mill would not be changed, and the land would be occupied for milling purposes.

In our case, however, we have more than a brief interruption of a

few months, or even a few years. Instead, there is more than a decade of nonuse of the mill structure. While the predicted startup costs are considerably less than the original cost or replacement cost of the mill, they are more than nominal. Without substantial expenditures the structure is not an operable mill. All of the evidence concerning sources of ore, costs, distance of the mill from the ore and the market, establish the economic infeasibility of a renewed milling operation on the site. The evidence is not persuasive that the prospective use of the Gary mill would serve to meet the purposes of the mining laws by providing an essential and needed milling operation. Instead, the proposal to renew operations suggests an attempt to establish a mere color of compliance with the laws so as to continue to encumber the public lands with the Gary mill structure. *See Hard Cash & Other Mill Site Claims*, 34 L.D. 325, 327-28 (1905).

A millsite is not occupied for milling purposes where a mill structure is not used for milling for more than a reasonable time and becomes inoperable. We find that the nonuse of the Gary mill structure was more than a reasonable interruption of a milling operation, that the structure was not operable at the time of the withdrawal application, and therefore, the millsite was not then valid either under the first or second clause of the millsite law.

Most of this discussion has concerned the Gary millsite because of

⁵ See *United States v. Larsen*, 9 IBLA 247, 274 (1973); *United States v. Goston*, A-30835 (February 23, 1968); *United States v. Crawford*, A-30820 (January 29, 1968), holding that a dependent millsite will be held invalid if it is used only in connection with a mining claim that is held invalid for lack of a discovery.

the existence of the Gary mill structure on that site. As has been indicated, however, there has been no use of the Donna millsite for mining or milling purposes since 1958, and no improvements or other occupancy of the site for such purposes at the time of the withdrawal. Therefore, that claim must also be declared invalid, as it is not used or occupied for mining or milling purposes. Its validity, too, must be tested as of the date of the withdrawal of the land, as well as at the present time. Proposed use of either of the sites for future milling operations is not sufficient. *United States v. Wedertz, supra.*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.⁶

JOAN B. THOMPSON,
Administrative Judge.

I CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

⁶ With their Statement of Reasons for Appeal, appellants filed a motion to correct asserted errors in the hearing transcript of contestee Cuneo's testimony to comport with an affidavit of Mr. Cuneo attached to the motion. The contestees did not receive a hearing transcript prior to the Judge's decision. The corrections requested do not change the substance of contestee's testimony; they merely clarify the assertedly erroneous portions of transcript. In these circumstances, contestees' motion is granted and contestant's objection to the motion and affidavit is overruled. We have considered the submitted corrections in reaching our decision.

On June 23, 1973, contestant filed a motion for an order amending the April 25, 1973, Order of this Board granting an extension of

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I agree with the result reached in the majority opinion, but comment as to construction of section 15 of the Act of May 10, 1872, 17 Stat. 96, 30 U.S.C. § 42 (1970). Regarding the Gary millsite, my concurrence is reluctant because of appellants' substantial investment; however, the mill has not operated since 1958, and appellants have submitted no assay reports or other independent evidence as to sources of ore for the mill.

Under the last sentence of section 15,¹ the owner of a mill or reduction works, who does not own a mine in connection therewith, may receive a patent for his site "as provided in this section." Such language incorporates, as to custom mills, those portions of the preceding sentence of the section in which it is provided that the site to be patented must be:

- a. Nonmineral land.
- b. Not contiguous to *the* vein or lode.
- c. Used *or* occupied for mining or milling purposes.
- d. Not larger than five acres.

As of the date of the filing of the withdrawal application, May 3, 1972, the site herein concerned was not being used for mining or milling purposes. The case turns on whether appellants sustained their burden

time to appellant. The motion would delete the phrase "and no objection appearing of record" from this Board's Order. Contestant's motion is granted, and this Board's Order of April 25, 1973, is hereby amended *nunc pro tunc*.

¹ See majority opinion.

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of proving that there was such occupancy as evidences a good faith intention to use the site for such purposes. See *United States v. Skidmore*, 10 IBLA 322, 327 (1973); *Charles Lennig*, 5 L.D. 190, 192 (1886). While the record indicates some confusion as to recognition of the "occupied" issue,² appellants were aware of the issue; they presented evidence thereon and they argued the issue. (Tr. 154). Even though the complaint failed to include a charge that the land was not occupied for mining or milling purposes, it must be deemed that appellants had sufficient notice of the issue. See *Armand Co., Inc. v. FTC*, 84 F. 2d 973, 974-75 (2d Cir. 1936), cert. denied, 299 U.S. 597 (1936), noted in DAVIS, ADMINISTRATIVE LAW TREATISE § 8.04 (1958); *United States v. Pierce*, 3 IBLA 29 (1971). Cf. Fed. R. Civ. P. 15(b).³

The purpose of the statute is to encourage development of custom

mills to serve mining areas—"the vein or lode" referred to in the first sentence of section 15. In order to fulfill this purpose, a site occupied for milling purposes must be in proximity to one or more veins or lodes; such veins or lodes must be of a quality and quantity that ore taken therefrom can be processed at the millsite with a reasonable expectation of profit.

Appellee made a prima facie case that such sources of ore were not available. The burden of proof then shifted to appellants to prove the ore sources by convincing evidence. While it is recognized that the market price of metals fluctuates and that under certain circumstances the site of an existing mill may be deemed "occupied" because it is held to be later used for milling purposes, a contestee must in such circumstances prove by specific information the availability and quality of the minerals which are likely to be processed in the mill. Such evidence and expert opinion in connection therewith can then be evaluated, together with information as to expected fluctuations of the market, in order to determine whether occupancy of a site can reasonably be said to be for milling purposes.

On the basis of appellants' evidence, it is not possible to make a determination that the land was so occupied. Appellants have failed to offer convincing proof as to the quality and quantity of tungsten ore available from the June B and Tin Bucket Mines, the only sources of ore cited. Because appellants have

² It is recognized that: (a) the complaint failed to include a charge that the sites were not "occupied" for mining or milling purposes; (b) counsel for contestant stated that "the validity of the mines [to supply the mill] * * * is not being questioned by the Government at this hearing" (Tr. 71); (c) the Administrative Law Judge's decision states on page 1 that the hearing was held to determine whether the claims were actually being "used" for mining or milling purposes; and (d) that decision on page 4 refers to "use" as the Departmental criterion and states that the issue is whether the millsites were used and occupied.

³ While the Federal Rules of Civil Procedure have not been adopted to govern mining contests, the Rules may be referred to for a guide as to fairness of procedure in connection with administrative pleadings. See *In re De Georgey*, 7 Ad. L. 2d 831 (Office of Alien Property 1958).

not sustained their burden of proof and on the basis of the prima facie case made by appellee, I reluctantly find that the site was not occupied for mining or milling purposes as of the critical date.

JOSEPH W. GOSS,
Administrative Judge.

CLINCHFIELD COAL COMPANY

3 IBMA 154

Decided May 15, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from an order by an Administrative Law Judge (Judge), dated September 25, 1973, dismissing without prejudice 36 Petitions for Assessment of Civil Penalty for failure to comply with a prehearing order.¹

Vacated and remanded.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge lacks authority to order MESA to recompute proposed assessments of civil penalty.

¹ Docket Nos. NORT 72-53-P, NORT 72-81-P, NORT 72-83-P, NORT 72-86-P, NORT 72-94-P, NORT 72-118-P, NORT 72-119-P, NORT 72-131-P, NORT 72-136-P, NORT 72-145-P, NORT 72-148-P, NORT 72-158-P, NORT 72-165-P, NORT 72-174-P, NORT 72-176-P, NORT 72-180-P, NORT 72-181-P, NORT 72-185-P, NORT 72-188-P, NORT 72-189-P, NORT 72-192-P, NORT 72-193-P, NORT 72-200-P, NORT 72-201-P, NORT 72-204-P, NORT 72-205-P, NORT 72-209-P, NORT 72-210-P, NORT 72-215-P, NORT 72-217-P, NORT 72-224-P, NORT 72-227-P, NORT 72-229-P, NORT 72-231-P, NORT 72-232-P, NORT 72-239-P, consolidated by the Judge under the Docket No. NORT 72-53-P.

APPEARANCES: J. Philip Smith, Esq., Assistant Solicitor, Michael M. Hunter, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Wesley C. Marsh, Esq., for appellee, Clinchfield Coal Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

This proceeding arises as a result at the Mining Enforcement and Safety Administration (MESA) filing 36 Petitions for Assessment of Civil Penalty pursuant to the assessment procedure then in effect, 30 CFR Part 100, 36 F.R. 779, Jan. 14, 1971. The last of these petitions was filed on May 25, 1972. This procedure was subsequently suspended on March 15, 1973, as a result of the decision in *National Independent Coal Operators Association v. Morton*, 357 F. Supp. 509 (D.D.C., 1973)² and a new procedure and assessment formula was adopted on April 24, 1973, 38 F.R. 10085. In each of the 36 docketed cases,

² This case has been reversed in *National Independent Coal Operators Association v. Morton*, No. 73-1678 (D.C. Cir. February 11, 1974) with the Court holding that the Secretary need not prepare a formal decision on a proposed assessment "where no hearing is requested by the operator and no issues are in dispute." The District Court's decision in *NICOA*, *supra*, has been supported by the recent decision in *Morton v. Delta Mining Inc.*, No. 73-1752 (3d Cir. March 20, 1974) holding contrary to the District of Columbia Circuit Court of Appeals.

Clinchfield Coal Company (Clinchfield) initiated requests for hearing and formal adjudication pursuant to the procedure and regulations applicable at the time. On September 4, 1973, 15 months after the last of these 36 petitions was filed and prior to a prehearing conference, the Administrative Law Judge (Judge), *sua sponte*, ordered MESA to recompute the proposed assessments under the formula put into effect on April 24, 1973, and to submit such new proposed assessments to the operator prior to scheduling a prehearing conference. It does not appear that the operator itself had requested a recomputation under the new formula at any stage after the filing of the petitions.

On September 14, 1973, MESA moved the Judge to vacate this order on the grounds that he had exceeded his authority in that "[t]he Office of Hearings and Appeals does not have jurisdiction to require MESA * * * to recompute proposed assessments, or to * * * force * * * MESA to settle civil penalty cases." On September 25, 1973, the Judge ordered all 36 cases dismissed without prejudice due to MESA's failure to comply with his "prehearing" order and to prosecute with diligence.

MESA appeals the Judge's order of dismissal, contending that the underlying order requiring recomputation of the civil penalty assessments which precipitated the dismissals, was improper, and not within the Judge's authority to issue.

Issue Presented

Whether the Judge has authority to order recomputation of assessments by MESA where the procedure for calculating proposed penalty assessments is revised during the period between the filing of the Petitions for Assessment of Civil Penalty and hearing.

Discussion

In *Spring Branch Coal Company*, 2 IBMA 154, 80 I.D. 438, CCH Employment Safety and Health Guide, par. 16,240 (1973), the Board held that the hearing before a Judge is a *de novo* proceeding in which the penalties are fixed on the basis of the evidence presented irrespective of any prior proceeding. It has long been this Board's position that the proposed penalty assessment is not relevant as to a hearing and formal adjudication under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).³ Therefore, it would appear that it is beyond the scope of the Judge's authority to order MESA to recompute a proposed assessment either for the benefit of the operator or himself. The Judge's responsibility as set forth in section 109 of the Act and 43 CFR 4.582 is to adjudicate the issues properly before him and to issue a decision based on the record established at hearing.

³ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

As we stated in the first opinion published by this Board, *Freeman Coal Mining Corporation*, 1 IBMA 1, 13, 77 I.D. 149; 156, CCH Employment Safety and Health Guide, par. 15,367 (1970):

We do not understand the Secretary's delegation to the Board to confer upon the Board general supervisory authority over the entire spectrum of the Bureau's [MESA's] enforcement practices and policies. The Secretary's delegation to the Board of a variety of review and adjudicatory functions specifically provided for in the Act was intended, in our judgment, to create an administrative forum that would exercise these specific statutory functions independently of the Department's various enforcement arms. * * * [W]e believe the Board's authority is primarily that conferred by section 105 of the Act, which provides for review of orders and notices once issued, and by certain other provisions in the Act which provide for the assessment of penalties and the adjudication of other matters in proceedings initiated, not by the Board, but by an appropriate interested party or by the Bureau [MESA].

Also in a footnote to that decision we stated that, "* * * we do not believe that * * * the exercise by the Board of power to compel the initiation or maintenance of enforcement proceedings is consistent with the independent review function contemplated by the delegation of authority under which the Board was created."

It has been held that, "[t]he courts are not authorized to second-guess an administrative official in the performance of his duties. We may not substitute our judgment for his * * *." *Van Hoven Company, Inc. v. Stans*, 326 F. Supp. 827 (D.

Minn. 1971). Based upon our opinion in *Freeman*, and the Court's opinion in *Van Hoven*, we have adhered to a position from the outset that this Board does not have authority to interfere with MESA as the enforcement arm of the Secretary in its application of the informal assessment procedure. Since the Board performs a review function with regard to decisions issued by the Judges, it follows that they can possess no greater authority than we. Accordingly, we hold that an Administrative Law Judge may not interfere with MESA's informal assessment functions or enforcement procedures.

It is, therefore, the conclusion of this Board that the issuance of the order requiring recomputation was beyond the Judge's authority in the instant case and the order of dismissal must be vacated.

Since the briefs of both parties discuss our decisions in *Ranger Fuel Corporation*, 2 IBMA 186, 80 I.D. 604, CCH Employment Safety and Health Guide, par. 16,541 (1973), and *United States Fuel Company*, 2 IBMA 315, 80 I.D. 739, CCH Employment Safety and Health Guide, par. 16,954 (1973), we have considered them in light of this decision. We believe all three decisions are consistent, but realize that reasonable minds might differ in the interpretation of the language of these two cases. Therefore, to the extent that the above two decisions may be inconsistent with this decision, they are hereby overruled.

(DECEASED WISCONSIN WINNEBAGO UNALLOTTED)

*May 15, 1974***ORDER**

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that order of dismissal of the above-captioned dockets IS VACATED and the proceedings ARE REMANDED to the Administrative Law Judge.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

**ESTATE OF JONAH CROSBY
(DECEASED WISCONSIN
WINNEBAGO UNALLOTTED)**

2 IBIA 289

Decided May 15, 1974

Petition to reopen.

Denied and dismissed.

100.0 Indian Probate: Generally

The Department of the Interior does not have authority to declare a state statute unconstitutional as being in violation of the Constitution of the United States.

APPEARANCES: Legal Aid Society of Omaha, by Patrick A. Parenteau, for Robert Price, petitioner.

*OPINION BY
ADMINISTRATIVE JUDGE
WILSON*

*INTERIOR BOARD OF
INDIAN APPEALS*

This matter comes before the Board on a petition filed by The Legal Aid Society of Omaha, Nebraska for and in behalf of Robert Price, hereinafter referred to as petitioner, requesting a reopening of the above-captioned estate for the purpose of allowing the petitioner to file a petition for rehearing on an order determining heirs entered by Administrative Law Judge Vernon J. Rausch on January 7, 1974.

In support of the petition the petitioner alleges:

(1) That petitioner has been aggrieved by the order determining heirs in the said estate in that he has been wholly barred from receiving any intestate distribution by operation of Nebraska Statutory Law § 30-109, Nebraska R.S. (1965) as found by the Administrative Law Judge in his decision dated January 7, 1974.

(2) That Nebraska R.S. (1965) § 30-109 is unconstitutional in that it violates the rights guaranteed to petitioner under the equal protection clause of the 14th Amendment to the United States Constitution, and, that the Administrative Law Judge's reliance upon such statute as a basis for determining that, petitioner is not entitled to share, as an heir at law, and any distribution of the intestate's estate herein is, therefore, erroneous.

The Nebraska statute in question reads as follows:

Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have ac-

knowledgeed himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him, as aforesaid, or adopted him into his family, in which case such child and all legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the other shall inherit his estate, and the heirs, as hereinbefore provided, in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estate of all such children as provided hereinbefore, in like manner as if all had been legitimate.

The petitioner assigns several reasons why a petition for rehearing was not filed in the matter under 43 CFR 4.21. However, those reasons need not be considered as it is quite apparent that the petitioner is attacking the Judge's decision of January 7, 1974, strictly on the constitutionality of the Nebraska illegitimacy statute, *supra*.

A petition to reopen under 43 CFR 4.242 requires that it be filed with the Administrative Law Judge for action from which an appeal may then be taken. This has not been done in the case at bar. However, since the basis for the petition involves only the constitutionality of a statute it would be futile and certainly would serve no useful purpose to remand the petition to the

Administrative Law Judge for his consideration and action since he is without authority to declare a statute unconstitutional. The Judge under the circumstances would have no alternative but to deny the petition and from which an appeal could then be taken. Accordingly, the Board, in order to expedite the matter will exercise its jurisdiction, which it holds concurrently with the Administrative Law Judge, in disposing of the petition herein.

This Board, like the Administrative Law Judge is without authority to declare a state statute unconstitutional. Only the Courts have the authority to do so. 3 *Davis, Administrative Law Treatise*, section 20.04; *Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958).

Moreover, it is the policy of the Department of the Interior to expedite the exhaustion of a petitioner's administrative remedy whenever the petitioner, in good faith, raises the issue as to the constitutionality of an act the Department is charged with following, so that he may pursue the proper relief in the Courts. *Estate of Benjamin Harrison Stowhy*, 1 IBIA 269, 79 I.D. 426 (1972) and *Estate of Florence Bluesky Vessell*, 1 IBIA 312, 79 I.D. 615 (1972). Such a policy not only affords prompt relief to the petitioner but, also, assists Departmental officials in meeting their responsibilities.

Since no other grounds, other than the constitutional issue, are

v. AREA DIRECTOR, BILLINGS

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given in support of the petition herein, the petition must be denied and dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is hereby ordered:

(1) That the petition herein is DENIED and DISMISSED, and

(2) That this decision shall be executed and distribution made thereof by the Administrative Law Judge in accordance with the provisions of 43 CFR 4.296.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Law Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

**ADMINISTRATIVE APPEAL OF
MARGARET PHILLIPS BLIXT
V.
AREA DIRECTOR, BILLINGS**

2 IBIA 295

Decided May 16, 1974

Appeal from an administrative decision of the Commissioner, Bureau of Indian Affairs, affirming a decision of the Area Director, Billings Area Office.

Affirmed.

Indian Tribes: Generally—Indian Tribes: Organized Tribes

Ordinances or resolutions passed under a popular referendum of the general membership of the tribe cannot override, supplant, or compromise restraints contained in a tribe's constitution and charter.

APPEARANCES: Margaret Phillips Blixt, pro se.

*OPINION BY
ADMINISTRATIVE JUDGE
WILSON*

*INTERIOR BOARD OF
INDIAN APPEALS*

This is an appeal filed by Margaret Phillips Blixt, a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana, hereinafter referred to as the appellant, from the decision of the Commissioner, Bureau of Indian Affairs, issued February 22, 1974, which affirmed the decision of July 26, 1973, rendered by the Area Director, Billings, wherein he disapproved Tribal Ordinance 55A.

The appeal herein was transferred to the Director, Office of Hearings and Appeals by special delegation of authority from the Secretary's office, and by redelegation of authority from the Director to this Board, copies whereof are attached and identified herein as Appendixes "A" and "B", respectively.

A finding is made that the appeal herein was timely filed and notice is hereby given that the appeal herein is docketed by this Board for decision.

A further finding is made that the appeal record is considered adequate and sufficient upon which to base a decision. Accordingly, this appeal will be disposed of forthwith without requiring the filing of further legal briefs or statements by the parties concerned.

This case arises from an ordinance approved by the general membership of the Confederated Salish and Kootenai Tribes pursuant to Section 1, Article IX, of its Constitution.

The ordinance in question identified as 55A states as follows:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes that:

1. Ninety (90) percent of tribal income shall be paid out per capita.

2. Ten (10) percent of tribal income shall be retained for administrative purposes to be expended as the Tribal Council determines in the tribe's best interest.

3. No expenditures shall be made from the reserve funds unless approved by the people in a referendum.

The Area Director under date of July 26, 1973, disapproved the ordinance on the following basis:

* * * That the mandatory 90 percent provision for a per capita payment places limitations on the Council which are not in accordance with the Constitution and Charter [of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana].

The appellant, as a member of said Confederated Salish and Kootenai Tribes, after first requesting and receiving clarification of the Director's decision of July 26, 1973, on August 27, 1973, appealed the

Director's decision to the Commissioner, Bureau of Indian Affairs, pursuant to 25 CFR 2. The appellant in support of her appeal stated:

This appeal is made because the action of the Area Director in disapproving Ordinance 55A in effect appears to void the results of a tribal referendum which according to the Constitution is binding on the Tribal Council. This leaves the affected Tribal members with no recourse or means of control over the actions of the Tribal Council.

The Commissioner in his decision of February 22, 1974, wherefrom this appeal has been taken, as basis for his decision, among other things stated:

Because of the legal uncertainties, I must deny your appeal and confirm the decision of Area Director Canan as set forth in his letter of July 26, 1973, to the Tribal Chairman. If it is the desire of the tribal members to amend their constitution and corporate charter the means for such amendments are clearly spelled out in those documents. If you or other tribal members wish to initiate an amendment to place further limitations on the power of the tribal council to expend tribal funds and provide for per capita payments, I am sure that the technical advice of the Bureau of Indian Affairs would be made available to assist in drafting a proposed amendment, and to advise as to the particular consequence of such limitations on tribally funded programs. While it might be desirable to place further limits on the tribal council's authority to spend funds, care should be taken to prevent reduction of desired services from the tribe.

Section 1(h), Article VI, permits the Tribal Council to appropriate for tribal use without the review of the Secretary an amount not to exceed \$25,000. We note the limitation set forth therein was effected by an

V: AREA DIRECTOR, BILLINGS

May 16, 1974

election of the general membership pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 984), *as amended* by the Act of June 15, 1935 (49 Stat. 378). Accordingly, any changes thereto would require an amendment in accordance with Article X of the Constitution and 25 CFR 52. It therefore follows that the ordinance in question passed pursuant to Section 1, Article IX, cannot be interpreted or construed as amending Section 1(h), Article VI. Accordingly, we find Ordinance 55A cannot legally override, supplant or compromise the restraint or limitation mandated on the Tribal Council by Section 1(h), Article VI.

Section 8 of the Corporate Charter of the Confederated Salish and Kootenai Tribes limits the distribution of profits that can be made in any one year. Section 8 provides:

Any such distribution of profits in any one year amounting to a per capita cash payment of \$100 or more, or amounting to a distribution of more than one-half of the accrued surplus, shall not be made without the approval of the Secretary of the Interior.

Accordingly, we further find and conclude that any change in the limitation as set forth in the Charter would require an amendment in accordance with Section X of the Charter and 25 CFR 52.

The appellant in her appeal to the Secretary contends:

(1) That Ordinance 55A was processed in accordance with Section 1, Article IX of the Constitution of the Confederated Salish and Kootenai Tribes of

the Flathead Reservation, Montana which reads:

Section 1. Upon a petition of at least one third ($\frac{1}{3}$) of the eligible voters of the Confederated Tribes, or upon the request of a majority of the members of the Tribal Council, any enacted or proposed ordinance or resolution of the Council shall be submitted to a popular referendum, and the vote of the majority of the qualified voters voting in such referendum, shall be conclusive and binding on the Tribal Council, provided that at least 30 per cent (30%) of the eligible voters shall vote in such election.

(2) That the Ordinance should be handled as an amendment to the Constitution since it was processed in the same manner as required for amendments.

(3) That the Ordinance is binding on the tribe until it is amended by a subsequent referendum.

In reviewing the record there appears to be one basic issue which requires resolution by this Board. The issue is:

Does Ordinance 55A as passed under Section 1, Article IX, override or supplant the restraints and limitations set forth in the Tribal Constitution and the Corporate Charter?

Section 1(h), Article VI, provides:

To appropriate for tribal use of the reservation any available, applicable funds in the tribal treasury; provided that any such appropriation in excess of \$25,000 shall be subject to review by the Secretary of the Interior.

It would therefore follow that Ordinance 55A cannot legally override or supplant or compromise the restraint set forth in Section 8 of the Charter.

In conclusion we find that Ordinance 55A, at the most, attempts to override and supplant and compromise Section 1(h), Article VI of the Constitution of the Confederated Salish and Kootenai Tribes and Section 8 of the Corporate Charter of said Confederated Tribes, and, contrary to the belief of the appellant, is not legally binding upon the Tribe to the extent of removing the restraints and limitations set forth in the Constitution and Charter of said Confederated Tribes.

For the reasons hereinabove set forth, the decision of the Commissioner, Bureau of Indian Affairs, dated February 22, 1974, must be and the same is hereby **AF-FIRMED**.

This decision is final for the Department of the Interior.

ALEXANDER H. WILSON,
Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

DAVID J. MCKEE,
Chief Administrative Judge.

APPENDIX "A"

May 11, 1973

MEMORANDUM

TO: BOB HITT

FROM: W. L. ROGERS

SUBJECT: RECOMMENDATION THAT
THE OFFICE OF HEARINGS AND
APPEALS BE DELEGATED THE AU-

THORITY TO HANDLE APPEALS
FROM DECISION OF THE BUREAU
OF INDIAN AFFAIRS.

In response to your request for comments on the subject question, attached is a memorandum from Bill Gershuny prepared at my request which reflects the position of this office:

1. Enrollment appeals should continue to be handled in accordance with existing procedures.

2. All appeals except enrollment appeals could well be handled by the Office of Hearings and Appeals, and it is recommended that authority to review such appeals be delegated to the Board of Indian Appeals.

W. L. ROGERS.

APPENDIX "B"

April 10, 1974

MEMORANDUM

TO: CHIEF ADMINISTRATIVE JUDGE,
BOARD OF INDIAN APPEALS

FROM: DIRECTOR

SUBJECT: DELEGATION OF AUTHORITY.

Pursuant to the authority of the Director, Office of Hearings and Appeals, to appoint Ad Hoc Boards of Appeal, 43 CFR 4.1(5), the Board of Indian Appeals is hereby authorized to consider and rule upon appeals from decisions of officials of the Bureau of Indian Affairs and to issue decisions thereon, deciding finally for the Department all questions of fact and law necessary for

May 16, 1974

the complete adjudication of the issues. This ad hoc authority shall remain in force and effect until the Board's authority to hear such appeals is published in the Federal Register.

JAMES R. RICHARDS.

ASSOCIATED DRILLING, INC.

3 IBMA 164

Decided *May 16, 1974*

Appeal by Associated Drilling, Inc. from a decision of the Administrative Law Judge dated May 11, 1973 (Docket No. PITT 72-194-P), assessing a civil monetary penalty of \$350 for five violations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in part and reversed in part.

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Findings

Where an Administrative Law Judge fails to incorporate in his decision appropriate findings of fact or to state the reasons therefor, as required by the Administrative Procedure Act, in lieu of a remand, the Board may make the appropriate corrections for the Department in accordance with the evidence of record.

Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials or Qualified Technicians: Assessment of Penalty

Congress never intended that a notice of violation be issued or a civil penalty assessed, where compliance with the

mandatory health or safety standard is impossible due to the unavailability of equipment, materials, or qualified technicians.

APPEARANCES: Richard M. Sharp, Esq., Philipsburg, Pennsylvania, Attorney for appellant, Associated Drilling, Inc.; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and Richard V. Backley, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The Bureau of Mines, now Mining Enforcement and Safety Administration (MESA), on May 24, 1972, filed a petition for the assessment of civil penalties against Associated Drilling, Inc. (Associated) charging such operator with nine violations of the Federal Coal Mine Health and Safety Act of 1969¹ with respect to the operation of its Kephart Mine.

This proceeding was brought to hearing on its merits before an Administrative Law Judge (Judge) at Pittsburgh, Pennsylvania, on December 7, 1972. In his decision, rendered May 11, 1973, the Judge vacated four of the alleged violations and assessed penalties in the

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

total amount of \$350 on the other five violations charged.

Associated appeals to this Board from that decision contending that the Judge erred by making erroneous findings with respect to the statutory criteria in assessing penalties on four of the violations, and further that the Judge erred by finding that a violation of 30 CFR 75.303 occurred as alleged in *Notice No. 1 RGN, June 10, 1971*. Associated requests the Board to remand the proceeding to the Judge for appropriate correction of the decision, or dismissal.

Issues Presented for Review

A. Whether the Judge erred by failing to conform to § 557, Title 5 of the U.S. Code (Administrative Procedure Act) requiring specific findings of fact and stating reasons for certain findings.

B. Whether the evidence is sufficient to support a violation of 30 CFR 75.303 as alleged in *Notice No. 1 RGN, June 10, 1971*.

Discussion

A.

We agree with the operator on this issue that the Judge technically erred by not making certain specific findings and by failing to state reasons for other findings. However, we consider these deficiencies to be harmless and subject to correction by the Board on the basis of the record made and without requir-

ing remand as suggested by Associated.²

The Judge made the following basic findings of fact: (1) that Associated's mine produces approximately 800 tons of coal per day and employs approximately 36 miners underground; and (2) that there is no evidence in the record of a history of previous violations. Therefore, the Board finds: (1) that the mine was relatively small and that the penalties imposed are not disproportionate to the size of the operator's business; and (2) that there is no history of previous violations to be considered in this proceeding.

While true that the Judge did not make a specific finding on the effect the monetary penalties would have on the operator's ability to continue in business, there is no evidence in the record on this criterion. Therefore, we must assume that the penalties imposed will not adversely affect Associated's ability to so continue.³ Based upon such assumption, we find that Associated's ability to continue in business will not be adversely affected by the penalties assessed. The record supports the Judge's finding that all violations charged were abated promptly and in good faith and we so find.

The operator's specific objections to the Judge's findings on negligence

² See *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, CCH Employment Safety and Health Guide, par. 16,618 (1973).

³ *Hall Coal Co.*, 1 IBMA 175, 79 I.D. 668, CCH Employment Safety and Health Guide, par. 15,380 (1972); *Buffalo Mining Company*, *supra*, fn. 2.

May 16, 1974

and gravity with respect to four of the five alleged violations are as follows:

Notice No. 1 RGN, April 9, 1971, charges a violation of 30 CFR 75.301, in that: "The quantity of air passing through the last open cross-cut in the set of rooms off 5 left was 6,820 cubic feet per minute," whereas the regulation requires 9,000 cfm.

In assessing a penalty of \$50, the Judge stated that this violation was "not serious" and, further, that "the degree of negligence was not great." Associated's only objection on this is that it was error to make a finding of any comparative degree of negligence. Although we agree that in this case there need be only a finding of negligence, or non-negligence, we think this objection is not sufficient to justify a modification of the Judge's assessment. The evidence shows (Tr. 9, 10, 11) that a loose brattice cloth caused the violation and that the operator had a duty to check and tighten the line brattices, but apparently failed to do so. We affirm the assessment of \$50 for this violation.

Notice No. 2 RGN, June 4, 1971, charges a violation of 30 CFR 75.516, in that: "The power cables for the two pumps in 3 butt were in contact with posts and the ribs at many locations." On this charge the Judge confined his findings on negligence and gravity to the following statement: "* * * While negligence was involved in allowing the condition to exist, the gravity was

small." The Judge assessed the penalty of \$50 for this violation.

Associated objects to this finding on the ground that the Judge failed to give any reasons for his finding of negligence.

Here again, we think the Judge should have stated with more clarity reasons for his finding but his language did at least show that he found the operator negligent and the violation not grave. (Tr. 28, 29, 30.) We, therefore, affirm the assessment of \$50 for this violation.

Notice No. 3 RGN, June 14, 1971, charges a violation of 30 CFR 75.1100, in that: "The 10 temporary pumps were not provided with fire extinguishers."

On this charge, Associated argues that, "since the Administrative Law Judge found that the violation was non-serious presumably because rock dust was at *each* location, that a most minimal penalty should have been assessed, and that an assessment of \$100 is entirely too great for this type of violation." (Italics supplied.)

We note that section 109(a)(1) of the Act provides in pertinent part:

* * * Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. * * *

In view of that provision, it is apparent that the Judge treated the failure to have a fire extinguisher for each of the ten pumps as separate offenses and thus assessed a \$10 penalty for each such offense. We

find no error in the Judge's ruling or any abuse of discretion in making these assessments. Therefore we affirm the total assessment of \$100 on this charge.

Notice No. 2, RGN, June 15, 1971, charges a violation of 30 CFR 75.1105, in that: "The air current used to ventilate the two permanent pumps at the high top and 1,000 feet outby 1 butt were not coursed directly into the return," as required by the regulation.

With regard to this violation, Associated notes that the Judge made no finding of fact as to whether the violation was serious, and did not discuss, in his decision, negligence or any facts upon which he based his finding of negligence.

We agree with Associated to the extent that it would have been better if the Judge had made *specific* findings on negligence and gravity regarding this violation. However, the evidence shows that the operator abated the violation by installing conduits to direct smoke from the pumps into intake air (Tr. 52) and the mine foreman, Mr. Kowalczyk, testified that he was unaware of the requirement for this safety standard (Tr. 58, 59). We find no evidence in the record on the matter of gravity and, therefore conclude that the violation was not grave. It is clear, however, that the operator was negligent by violating its duty to become informed of the requirement of the safety standard involved, and the Board so finds. (*Italics supplied.*)

Omission of the required findings

by the Judge having been supplied by the Board and no prejudice to the operator appearing therefrom, we see no reason not to affirm the assessment of \$50 for this violation.

B.

With respect to the fifth notice of violation involved in this appeal, *Notice No. 1 RGN, June 10, 1971*, Associated contends that the Judge erred by finding that a violation of 30 CFR 75.303 had occurred. We agree.

The subject notice (Govt. Ex. No. 22) described the conditions and practice which instigated its issuance as follows:

The preshift examinations of the belt conveyors did not include tests for methane with an electrical methane detector. The preshift examinations of the mine for the day shift and the preshift examinations of the belt conveyors were not made by certified persons.

The evidence established that Associated, on June 10, 1971, did not make tests for methane with an electrical methane detector as required by 30 CFR 75.303. (Tr. 43, 76, 77.) However, the operator introduced evidence that it possessed an electrical methane detector but that on the date of the inspection it was being repaired. The detector had been forwarded to the repair factory on May 27, 1971, and was returned on or about June 14, 1971 (Tr. 76, 77). During the period of time the detector was under repair, methane tests were being regularly conducted by use of a flame safety lamp. (Tr. 77.) Additional evidence

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was adduced to the effect that at the time of the alleged violation, methane detectors were difficult to obtain on the market because, "the Bureau of Mines had bought readily thousands of them and we [operators] couldn't get them." (Tr. 77.) The inspector also testified that in June of 1971, methane detectors were difficult to obtain because, "The market had used them up at some time during that period." (Tr. 44.)

The evidence also established that the preshift examination of the mines for the day shift and the preshift examinations of the belt conveyors were not made by certified persons (Tr. 44, 82). However, the operator introduced evidence to the effect that on some date prior to February 24, 1971, it had requested from the Bureau of Mines a temporary Qualification (Methane Detector) for Mr. Michael Kawa, Sr., the individual who had been performing the inspections (Resp. Ex. 3). On February 24, 1971, the operator received a letter from the Bureau which stated that the operator "should be receiving notification of temporary qualification within a week or two" for Mr. Kawa (Resp. Ex. 4). The operator was advised on August 18, 1971, that Mr. Kawa was qualified for methane detecting (Resp. Ex. 2).

In *Buffalo Mining Company*⁴ the Board held in pertinent part:

" * * *, we conclude that Congress did not intend that * * * a civil penalty [be] assessed where compliance with a man-

datory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians.

In view of the evidence discussed above, we find that the rationale of *Buffalo* is applicable in this case. Although MESA established a prima facie case, we believe the evidence introduced by the operator preponderated because: first, the electrical methane detector required was clearly unavailable to the operator at the time of the inspection; and secondly, because of the unexplained delay of the Bureau in acting on the request of the operator to have Mr. Kawa certified. Accordingly, we conclude that *Notice of Violation No. 1 RGN, June 10, 1971*, should be vacated and the penalty assessed by the Judge in the amount of \$100 set aside.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

1. That the decision of the Administrative Law Judge BE, and HEREBY IS, AFFIRMED, as hereinabove modified, with respect to *Notices of Violation Nos. 1 RGN, April 9, 1971; 2 RGN, June 4, 1971; 3 RGN, June 4, 1971; and 2 RGN, June 15, 1971;*

2. That the decision of the Administrative Law Judge BE, and HEREBY IS, REVERSED, with respect to *Notice of Violation No. 1*

⁴ *Supra*, fn. 2.

RGN, June 10, 1971; and that this Notice IS HEREBY VACATED and the assessment of \$100 thereon IS SET ASIDE; and

3. That the operator pay, as civil penalties in this proceeding, on or before 30 days from the date of receipt of this decision, the total sum of \$250.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

**UNIFORM RELOCATION
ASSISTANCE APPEAL OF
JOHN ROBERT MAYTAG**

1 OHA 50

Decided *May 17, 1974*

Appeal from a determination dated March 4, 1974, by the Chief, Division of Land Acquisition of the Rocky Mountain Regional Office of the National Park Service, Denver, Colorado, disallowing, in part, a claim for relocation assistance benefits in connection with the acquisition by the United States of Tract No. 01-103, Florissant Fossil Beds National Monument, Colorado.

Affirmed.

APPEARANCES: Robert J. Bernick, Esq., Gould, Moch and Bernick, Counselors at Law, Denver, Colorado, for appellant.

Uniform Relocation Assistance and Real Property Acquisition Policies

Act of 1970: Uniform Relocation Assistance: Moving and Related Expenses: Generally

Benefits under the Act and implementing regulations do not include reimbursement for moving and related expenses in removing a cowshed from the acquired lands where that structure was purchased as part of the realty acquired by the United States and it was removed under authority of a provision in the deed of conveyance which reserved to the grantor for a certain term, the right to remove all improvements removable from the land without damage to the land itself.

OPINION BY MS. PATTON

*OFFICE OF HEARINGS
AND APPEALS*

John Robert Maytag has appealed from a determination dated March 4, 1974, by the Chief, Division of Land Acquisition of the Rocky Mountain Regional Office of the National Park Service, which disallowed, in part, his claim submitted February 27, 1973, for certain relocation assistance benefits under section 202 of Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4622 (1970), as a displaced person, in connection with the acquisition by the United States on August 6, 1970, of real property identified as Tract No. 01-103 of the Florissant Fossil Beds National Monument, Colorado. Disallowed was an item of \$1,750, claimed under subsection 202(a)(1) of the Act as reimbursement for actual moving expenses incurred in disassembling and remov-

JOHN ROBERT MAYTAG

May 17, 1974

ing a cowshed from the acquired lands and reassembling it upon other land owned by the claimant.

The Chief, Division of Land Acquisition, held that this item was not reimbursable because the Act provides for reimbursement of costs of moving personalty only and not for moving realty. His opinion that the cowshed constituted realty was founded upon the following clause in the deed of conveyance of the acquired lands to the United States which authorized removal of the cowshed: "RESERVING unto the Grantor the use of the herein described land for grazing and hay mowing, and the right to remove all improvements to the property which can be removed without damage to the land itself, such right of use and removal to terminate within ten (10) years from date hereof." Correspondence in the record discloses that prior to the March 4, 1974, determination the claimant's attorneys were advised by the Rocky Mountain Regional Office that improvements on the acquired lands were regarded as part of the realty on the date of the deed, the grantor having reserved in that instrument the right to regain title only upon severance of the improvements from the land, and that the Act does not provide for payment of moving costs in regard to realty where the nature of the property changes due to occurrences subsequent to the execution of the deed.

In the appeal, as in the claim as first presented, the appellant's posi-

tion is that in the circumstances of the case the cowshed was not realty but personalty. In support of this view he submits that the intention of the parties concerning the reservation in the deed was that title to improvements on the land would remain in the grantor, subject to defeasance only if the improvements were not removed within the prescribed 10-year period, and, therefore, that the parties agreed, at the time of execution, delivery and acceptance of the deed, that the cowshed was to be regarded as personalty upon severance from the real property or as a chattel real, which is also personal property. The appellant asserts that the Government itself recognized the nature of improvements such as the cowshed to be personalty in the instant case in that it purchased a red barn on the acquired lands and required him, as vendor, to execute a bill of sale for the conveyance of title rather than a deed.

The record shows that subsequent to the taking of the appeal the Chief, Division of Land Acquisition, by letter dated March 27, 1974, advised the appellant of regulation 41 CFR 114-50.601-2 (38 F.R. 3973, February 9, 1973), providing, pertinently: "The following expenses shall not be included in the moving expense payment required to be made by § 114-50.601: * * * (b) Cost of moving structures or other improvements in which the displaced person reserved ownership, except as otherwise provided by law. * * *"

In response the appellant questioned whether the regulation was applicable in the instant case inasmuch as it was adopted after the conveyance of title with reservation of the right to remove improvements on the acquired lands. Further, he questioned the validity of the regulation, asserting that his claim was submitted under the statute and that the statute cannot be restricted or modified by the Department's regulation. Thereupon, on April 4, 1974, the Acting Chief, Division of Land Acquisition, replied that the cited regulation is applicable in this case because it was in effect at the time of the submission of the appellant's claim on February 27, 1973, having become effective on February 9, 1973, and, further, that the regulation was properly adopted by the Department as necessary in administering the Act, pursuant to authority contained in section 213 of the Act, 42 U.S.C. § 4633 (1970).

No evidence has been presented on appeal which would establish that the intention of the parties was other than that expressed in the language of the deed. By that instrument title to the land, "together with all appurtenances thereto," passed to the United States. No structures or improvements were excepted from the grant. The reservation in the deed provided only the right of use of the land by the grantor for the purposes and term specified and his right during the same period to remove all improvements removable without damage to

the land itself. Title to removable improvements on the lands was to be regained by the grantor only upon severance and removal of such improvements from the lands within the time specified; improvements not removed within the prescribed time would remain in the ownership of the United States as part of the acquired lands purchased by the United States. Thus the right to remove improvements, as agreed upon by the parties at the time of execution, delivery and acceptance of the deed, was a right to remove part of the realty acquired by the United States.¹ Although upon severance and removal from the lands the character of such removable improvements may have been changed to personal property, the grantor under the deed was compensated for such improvements as part of the realty upon execution, delivery, and acceptance of the deed, in accordance with the agreement of the

¹ We note in this connection the policy provisions contained in section 302 of Title III of the Act, 42 U.S.C. § 4652 (1970), 41 CFR 114-50.304, providing for acquisition of title to buildings, structures, and other improvements on acquired lands as part of the real property acquired.

The appraisal report of record in this case shows clearly that the estimated market value of the real property acquisition included the land and the improvements thereon, the latter being identified in the report as a barn, corrals, and other small buildings. No specific value was assigned to the improvements as such, however, on the basis of their design for a cattle operation and not for recreational homesite development which is the highest and best use of the property. The report states: "Clearly a buyer of the subject property would buy in view of its highest and best use and although the property could be used on an interim basis for cattle ranching it is doubtful that a buyer would pay any more per acre, overall, just because a barn and corrals are on the ownership."

JOHN ROBERT MAYTAG

May 17, 1974

parties; in the circumstances, moving and related expenses incurred in the exercise of the reserved removal rights are not reimbursable expenses for moving of personalty of the grantor, as provided for in section 202(a)(1) of Title II of the Act, *supra*. The fact that the United States purchased a red barn on the acquired lands subsequent to the time of execution, delivery, and acceptance of the deed, and required a bill of sale for the transfer of title, does not serve to change the character of the improvements on the acquired lands as realty. By such action the United States, in effect, purchased the right previously reserved by the grantor to sever and remove the barn from the acquired lands during the period specified. A bill of sale was not inappropriate in the circumstances.

Section 213 of the Act, 42 U.S.C. § 4633 (1970), empowers the Secretary of the Interior to establish such rules and procedures as he deems necessary or appropriate to achieve both uniformity in interpreting and implementing the law and the results for which the statute was enacted. The above-cited provision of § 114-50.601-2 of the regulations, precluding payment of the cost of moving structures or other improvements in which the displaced person reserved ownership, was adopted on February 9, 1973 (38 F.R. 3973) and was in effect at the time of submission of the appellant's claim for benefits under the

Act on February 27, 1973. The same regulation also provides, in paragraph (k) thereof, for exclusion from allowable moving expense payments of "such other items as the Bureau or Office determines should be excluded." The broad language of these regulatory provisions follows substantially the language of the Office of Management and Budget guidelines for development of uniform regulations and procedures for implementing the Act, issued May 1, 1972, in Circular No. A-103. The regulations are in harmony with the statute and represent a valid exercise of the Secretary's authority to prescribe regulations under the Act. In view thereof and based upon the foregoing analysis of the factual and legal situation presented in this case, we find that the costs of moving the cowshed, incurred in the exercise of the reserved removal rights, were properly determined to be nonallowable moving expenses in accordance with the purposes and intent of the Act and the implementing regulations.

The determination of the Chief, Division of Land Acquisition, which disallowed that item of the claim which is the subject of this appeal, is affirmed.

This decision constitutes the final administrative determination of the Department in this matter. 41 CFR 114-50.1101-1.

FRANCES A. PATTON,
Special Assistant to the Director.

**THE VALLEY CAMP
COAL COMPANY**

3 IBMA 176

Decided *May 17, 1974*

Appeal by the Mining Enforcement and Safety Administration (MESA) from an initial decision by an Administrative Law Judge (Docket No. MORG 72-88-P), dated July 9, 1973, vacating five Notices of Violation and assessing a monetary penalty of \$2,380 for other violations.

Affirmed in part and Reversed in part.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Noncompliance with one of the discretionary criteria for approval of a ventilation plan does not establish a violation of 30 CFR 75.316, unless it is established that the approved ventilation plan was violated.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Computer Printout

A notice of Non-Compliance is an official government record and will support a violation of the respirable dust standards.

APPEARANCES: Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and Madison McCulloch, Esq., Trial Attorney, on behalf of appellant, Mining Enforcement and Safety Administration. The Valley Camp Coal Company, appellee, has not participated in this appeal.

*OPINION BY
ADMINISTRATIVE JUDGE
ROGERS*

*INTERIOR BOARD OF
MINE OPERATIONS
APPEALS*

Background

Federal Coal Mine Inspector, William A. Holgate, issued *Notice of Violation No. 1 WAH, May 5, 1971*, because he observed that permanent stoppings were erected between the intake and return air course entries in 2 north section off 2 west of the Valley Camp Coal Company's (Valley Camp) No. 3 Mine and were only maintained to and including the sixth connecting crosscut outby the faces. (30 CFR 75.316.)

Inspector Glen T. Stricklin, issued *Notice of Violation No. 2 GTS, May 24, 1971*, because there were several cans of hydraulic oil in the 5 right off P north section of No. 3 Mine not in closed containers. (30 CFR 75.1104.)

Notices of Violation Nos. 1 WAH, May 12, 1971, 1 WAH, June 17, 1971, and 1 AJF, August 4, 1971, were issued as a result of computer printouts received from the MESA Computer Center, Denver, Colorado, and which showed non-compliance with the mandatory respirable dust standards. (30 CFR 70.100(a).)

On April 5, 1972, the Mining Enforcement and Safety Administra-

May 17, 1974

tion (MESA) filed a petition for the assessment of civil penalties against Valley Camp pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.¹ A hearing was held on September 13 and 14, 1972. The Administrative Law Judge (Judge) issued an initial decision dated July 9, 1973. He vacated *Notice of Violation No. 1 WAH, May 5, 1971*, alleging a violation of 30 CFR 75.316 and *Notice of Violation No. 2 GTS, May 24, 1971*, alleging a violation of 30 CFR 75.1104. In addition, he vacated three Notices of Violation citing 30 CFR 70.100(a). Thereafter, he assessed a monetary penalty of \$2,380 for other violations which are not a part of this appeal.

Issues Presented on Appeal

A. Whether the evidence is sufficient to establish that permanent stoppings should have been erected between the intake and return air-courses in entries and should have been maintained to and including the third connecting crosscut outby the faces of the entry.

B. Whether hydraulic oil is a "lubricating oil" which should be kept in a fireproof closed, metal container.

C. Whether a computer printout of noncompliance is sufficient to establish a prima facie showing of a violation of the respirable dust standards.

Discussion

A.

Notice of Violation No. 1 WAH, May 5, 1971, alleges the following violation of 30 CFR 75.316:

Permanent stoppings were erected between the intake and return air course entries in 1 north section of 2 west and were only maintained to and including the sixth connecting crosscut outby the faces.

30 CFR 75.316 provides in pertinent part:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator * * *.

30 CFR 75.316-2 provides in part:

This section sets out the criteria by which District Managers will be guided in approving a ventilation system * * *.

* * * * *

(b) Permanent stoppings * * * should be constructed of substantial, incombustible material such as concrete, concrete blocks * * * having sufficient strength to serve the purpose for which the stopping or partition is intended. * * * Such permanent stoppings should be erected between the intake and return aircourses in entries and should be maintained to and including the third connecting crosscut outby the faces of the entries.

The Judge in vacating this Notice of Violation in his decision stated as follows:

It is the position of (MESA) that permanent stoppings rather than temporary stoppings should have been erected inby that point. The regulation

¹P.L. 91-173. 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

in question requires that the operator adopt a ventilation system which shall be approved by the Secretary of the Interior and set out in printed form. There was no evidence that respondent was violating his ventilation plan by using temporary stoppings in by the sixth connecting crosscut. Regulation 75.316-2 merely sets out criteria for the guidance of district managers in approving ventilation plans. It does not set forth mandatory health or safety standards (Dec. 4).

MESA contends that at the hearing it was established "that the operator failed to adopt a ventilation system comprising certain standards required in approved ventilation plans." In support thereof it urges "that regardless of any plan there is a violation of a mandatory health and safety standard if a suitable ventilation system is not *adopted* by the operator. The 'suitable' requirement has been specifically defined in 30 CFR 75.316-2, and it is this requirement which has been violated." (*Italics supplied.*)

We cannot accept MESA's contentions on this point primarily because, as the Judge ruled below, section 75.316-2 does not set forth mandatory health or safety standards; it merely establishes criteria for the guidance of district managers in approving ventilation plans.

We note in our review of the record that the operator's ventilation plan was not introduced into evidence during the proceeding. Furthermore, there was no claim that the operator's ventilation plan did not conform to the statutory requirements. (Tr. 65.) The inspector did not issue the Notice of Violation

because the operator did not have an approved ventilation plan (Tr. 227), and it further appears that the inspector did not know the requirements of the plan for permanent stoppings between the intake and return air courses (Tr. 65, 66, 67).

It is further noted that MESA, during the proceedings below, urged the Judge to assume that the operator violated its ventilation plan because the plan would not have been approved if it did not comply with the statutory criteria. We reject this argument for lack of evidence, as did the Judge. We are of the opinion that if any assumption is to be drawn it is that the operator's plan did comply with the statutory's criteria; otherwise it would not have been approved by the MESA district manager.

Accordingly, and consonant with the foregoing, we affirm the Judge's ruling as to *Notice of Violation No. 1 WAH.*

B.

Notice of Violation No. 2 GTS, May 24, 1971, alleges a violation of 30 CFR 75.1104 in that:

There were several cans of oil in the 5 right off P north section not in closed containers.

During the course of the hearing it was developed that this was "hydraulic oil" and very flammable. In a deposition the inspector testified that "by upsetting a can of this oil, with the open containers, oil could get on the mine floor, and with *** shuttle buggies traveling with ***

May 17, 1974

cables on the mine floor, they could arc or spark and cause a fire." (P. 17.) There were other cans of oil in this section of the mine which were in closed, approved containers (Pp. 37-38).

30 CFR 75.1104 provides in pertinent part:

* * *, lubricating oil and grease kept in all underground areas in a coal mine shall be in fireproof, closed metal container * * *.

The Judge in his decision determined that, "* * * the section of the regulations cited involves the storage of lubricating oil and grease, not hydraulic *fluid*. The notice is accordingly vacated." (Dec. 7, *Italics Added*.)

MESA has invited the Board's attention to *The Kirk-Othmer Encyclopedia of Chemical Technology*, Second Completely Revised Edition, volume 12, pages 566 and 567, wherein a table of representative petroleum lubricating oils is set forth which lists hydraulic oil as a lubricating oil. This publication was not introduced or made available to the Judge for consideration prior to the rendering of his decision. Without determining whether the Encyclopedia would establish that hydraulic oil is a lubricating oil, we do not believe it proper for us to take official notice of it at this appellate stage of the proceeding. Assuming *arguendo* that this Encyclopedia warranted probative value, we think MESA should have introduced it during the hearing before the Judge so that he could have considered it, and the operator could

be afforded an opportunity to at least rebut whatever probative value it might have. As we view the record before us, it is barren of even a scintilla of evidence to establish that hydraulic oil or fluid is a "lubricating oil" within the meaning of the cited section. We do not imply that our decision on this point be construed in any way to indicate that the Board condones the practice of storing highly flammable liquids, of whatever composition, in underground areas of coal mines in other than fireproof, closed metal containers as may be prescribed by MESA. We are holding only that, in this particular case, MESA failed to sustain its burden of proof, and the vacation of the notice was proper.

C.

Notices of Violation Nos. 1 WAH, June 17, 1971, 1 WAH, May 12, 1971 and 1 AJF, August 4, 1971, allege violations of 30 CFR 70.100 (a) (respirable dust standards).

The Judge after recognizing the general procedures established for the collection and analysis of dust samples, to determine either compliance or noncompliance with the Act, stated:

In the instant proceeding, the only witnesses presented * * * were the inspectors who read the computer printouts [Notices of Non-Compliance] and wrote the Notices of Violation. While the inspectors were placed under oath and subject to cross-examination, the only probative evidence they were able to give was that they read the computer print-out, wrote the notice, and served the same on the operator.

After an analysis of what he deemed to be appropriate and dispositive case law, the Judge determined that the computer printouts were insufficient to establish the alleged violations of section 70.100 (a).

Recently, in *Castle Valley Mining Co.*, 3 IBMA 10, 81 I.D. 34, CCH Employment Safety and Health Guide par. 17,233 (1974), we held that a computer printout (Notice of Non-Compliance) (developed under standard procedures and regulations) is an official government record pursuant to 28 U.S.C. § 1733, and as such, creates a prima facie case as to the truth of the facts asserted therein. Accordingly, we find that the Judge erred in vacating the three Notices of Violations of the respirable dust standards. They should be reinstated, and an appropriate penalty assessed.

In assessing a penalty for these three violations, we have considered, as did the Judge below, and hereby adopt his findings and conclusions with respect to the size of the business of the operator, the effect on the ability to continue in business and the history of a previous violation. We further determine that the operator was negligent in allowing the conditions cited to be present. Furthermore, as we stated in *Castle Valley*, *supra*, the Board considers all violations of the respirable dust standards to be of a serious nature. In the absence of evidence to the contrary, we find that the operator exhibited good

faith in abating said violations. Under all circumstances and criteria, including those considered by the Judge, we consider and hold that a penalty of \$40 is appropriate for each of these violations.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision issued July 9, 1973, IS MODIFIED to the extent *Notices of Violation Nos. 1 WAH, May 12, 1971, 1 WAH, June 17, 1971, and 1 AIF, August 4, 1971, ARE REIN- STATED* that the Valley Camp Coal Company IS ASSESSED \$40 for each of these violations, and that the total assessment, \$2,500, be paid within 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ESTATE OF JOHN S. RAMSEY
(WAP TOSE NOTE)
(NEZ PERCE ALLOTTEE NO. 853,
DECEASED)

2 IBIA 305

Decided May 22, 1974

Motion for Reconsideration, oral argument, and for attorney's fees.

May 22, 1974

Denied.

365.0 Indian Probate: Reconsideration: Generally

Indian probate regulations do not contain any provisions for reconsideration of a matter which has been finally determined by the Secretary of the Interior, yet he has the inherent power to reopen and review administrative determinations when some new factors such as newly discovered evidence or fraud are involved.

APPEARANCES: Norman L. Gissell, Esq., for petitioner, Clara Ramsey Scott.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

The petitioner filed motions for reconsideration of the decision rendered in the above-entitled matter issued April 17, 1974, for oral argument, and for attorney's fees.

Indian probate regulations do not contain any provisions for reconsideration of a final decision, although the Board of necessity has inherent power to rectify manifest error in any of its decisions. *Estate of Julius Benter*, IBIA 70-5 (Supp.) (January 12, 1971).

A petition for reconsideration to be granted must contain an adequate basis for reconsideration such as newly discovered evidence or fraud. *Estate of Ute*, IA-143 (Supp.) (August 25, 1955).

The petitioner contends among other things that the Board erred in reviewing facts and issues not

presented by Appellant on Motion for Reconsideration.

We do not agree.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. See *National Labor Relations Board v. Elkland Leather Co., Inc.*, 114 F.2d 22, 225 (3d Cir., 1940), *cert. denied*, 311 U.S. 705.

Powers of an agency reviewing an initial or recommended decision of an examiner are greater than those of an appellate court reviewing the decision of a trial judge. *N.L.R.B. v. A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963).

We conclude that the Board of Indian Appeals has the authority to review the whole record and to make findings and render a decision opposite to that of the Administrative Law Judge.

The petitioner does not allege newly discovered evidence or fraud as additional grounds. Consequently, under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, it is determined that this matter has been properly conducted, decided and reviewed.

We further conclude, that since the matter was remanded for the purpose of determining the validity of the decedent's Last Will and Testament executed June 3, 1965,

that the motion for attorney's fees is premature.

IT IS ORDERED that the motions for reconsideration, oral argument and attorney's fees shall be and the same are hereby denied and the continuing mandate contained in the decision of April 17, 1974 directing the Administrative Law Judge to determine the validity of the decedent's Last Will and Testament executed June 3, 1965 is reaffirmed.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

DAVID A. PROVINSE

15 IBLA 387

Decided *May 28, 1974*

Appeal from a decision of the Montana State Office rejecting in part noncompetitive oil and gas lease offer M-24740.

Vacated and remanded.

Navigable Waters—Patents of Public Lands: Effect—Public Lands: Riparian Rights

Grants by the United States of its public lands bounded on streams or other waters, navigable or nonnavigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies.

Lieu Selections—School Lands: Generally—Public Lands: Riparian Rights

The acceptance by a State of other lands in lieu of lands lying within the meander line of a nonnavigable lake adjacent to the granted upland school section, was a relinquishment of any interest in the adjacent land underlying the lake as an incident to the grant of the school section and precludes assertion of a State claim to such lands.

Boundaries—Public Lands: Generally—Surveys of Public Lands: Generally

A meander line is not a line of boundary, although it may be given that effect by a withdrawal, exception, reservation or relinquishment of lands which border thereon.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

David A. Provinse has appealed from the June 21, 1973, decision of the Montana State Office, Bureau of Land Management (BLM), which rejected, in part, his oil and gas lease offer M-24740. The Montana State Office did not believe that the United States had title to those lands for which the lease offer was partially rejected. Those lands underlie a nonnavigable lake, known as Horseshoe Lake, and are located in Section 36, T. 36 N., R. 28 E., P.M., Phillips County, Montana.

Section 36 was granted to the

State of Montana upon its admission to the Union for support of its public schools. Act of February 22, 1889, sec. 10, 25 Stat. 676, 679. When the section was surveyed in 1911, Horseshoe Lake was meandered, and the surveyor's return indicated that the section was fractional. The deficiency was computed as 219.32 acres, or stated alternatively, the lake covered that many acres of land within the section. Pursuant to the Act of February 28, 1891, *as amended*, 43 U.S.C. §§ 851, 852 (1970), the State of Montana selected and was granted 219.32 acres of other lands in lieu of the deficiency in Section 36.¹

The Montana State Office was of the opinion that title to the lakebed was in the State of Montana, and not in the United States. This opinion was based on three different items: (1) a decision of the Director of the Bureau of Land Management styled *Rea H. Baker*, M 022695 (ND) (July 21, 1958); (2) an inquiry dated June 6, 1973, from the Chief, Division of Technical Services, to the Field Solicitor; and (3) the Field Solicitor's Opinion dated June 8, 1973.

The *Baker* decision held that where a school section was traversed by a nonnavigable body of water, and that water body was depicted by meander lines along the banks, the

lands within the meander lines are unsurveyed, and title to that unsurveyed land did not pass to the State upon approval of the plat of survey by virtue of the school grant. *Baker* further held that acceptance by the State of other lands in lieu of lands within the meander lines of a nonnavigable stream adjacent to uplands granted it as school lands is a relinquishment by the State of any claim of title to the lands within the meander lines.

The Chief, Division of Technical Services, in his June 6, 1973, request to the Field Solicitor for his opinion as to the ownership of the bed of Horseshoe Lake, disagreed with the *Baker* decision. It was the Chief's opinion that the State did not relinquish any claim to title to the unsurveyed lakebed. He reasoned that it never received title, nor did it have title, and thus had nothing to relinquish. The Chief read the *Baker* decision as a departure from the common law regarding riparian rights where an in-place school section is involved. According to the common law, the bed of the lake belongs to the owners of the adjoining upland.

In the Field Solicitor's response, he stated that assuming that Horseshoe Lake is a nonnavigable body of water, the standard rule of construction should apply in determining the ownership of the lakebed. This rule is statutory in Montana and provides as follows:

67-712. (6771) *Boundaries by water.* Except where the grant under which the land is held indicates a different intent,

¹ Survey approval for all of T. 36 N., R. 28 E., P.M., was given April 3, 1912. There were 420.68 surveyed acres in Sec. 36. Confirming patent, #1117250, for the surveyed acres was issued September 7, 1943. Assuming Sec. 36 embraces 640 acres, the State of Montana employed Lists 10, 21, 64, and 47 as deficiency base for lieu selections which totaled 219.32 acres.

the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream. *Revised Codes of Montana*, 1947.

He added that this rule is particularly applicable in light of 43 U.S.C. § 931 (1970):

Navigable rivers as public highways. All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both. (R.S. § 2476.)

He therefore concluded that ownership of the minerals in the bed of Horseshoe Lake accrues to the corresponding ownership of its shoreline. He also expressed the belief that *Baker* misconstrued the holding in *United States v. Oregon*, 295 U.S. 1 (1935).

Concerning that case, the Field Solicitor stated:

[T]he State of Oregon, by statute, attempted to lay claim to title [to land] underlying non-navigable bodies of water, which statute conflicted with a prior executive order declaring the area set apart as a bird reserve to be administered by a United States agency. The prior executive order controlled all later grants by the United States and, coupled with the State's relinquishment and selection of lieu lands, called for the holding cited therein.

Accordingly, the Montana State Office concluded that the United States did not own the bed of Horseshoe Lake and rejected appellant's offer to lease as to those lands. The

appellant, however, argues that the *Rex Baker* decision is correct, should be applied in this case, and consequently, a lease should be issued for the lakebed.

We agree that the United States has title to the bed of Horseshoe Lake. However, there is an inference which has been drawn from the *Rex Baker* case which is, at best, misleading. That inference was drawn from a rather cryptic paragraph which states:

The section 16 grant served to vest in the State all the surveyed lands in the section immediately upon survey. Title to the lands within the meander lines, not surveyed lands, did not pass to the State *by virtue of the school grant*, and if the grant was deficient in the 64.30 acres within the meander lines, the State was entitled to select indemnity lands. (Italics added.)

Clearly, title to school lands granted to the states by various acts does not pass to the state until such time as those lands have been surveyed. *United States v. Morrison*, 240 U.S. 192, 204 (1916); *Battle Mountain Wild Cat, Inc.*, 8 IBLA 157, 158 (1972). But lands within meander lines are excluded from official surveys and, hence, are considered to be unsurveyed. *Lee Wilson & Co. v. United States*, 245 U.S. 24, 29 (1917); *Bernard J. Gaffney*, A-30327 (October 28, 1965). The Act of February 26, 1859, *as amended*, 43 U.S.C. §§ 851, 852 (1970), provides that states may make selections of other lands in lieu of lands previously granted which, for some reason, have been found deficient. The purpose of

those Acts was to provide for the support of public schools. Therefore, it is clear that lands underlying water were considered deficiencies, since it was then considered that no money could be realized from their sale. See, e.g. *State of Idaho*, 37 L.D. 430, 433 (1909), where the Department stated that lands covered by water were not "land" within the meaning of the school land grants.

However, the difficulty with the proposition quoted from the *Rex Baker* case is the inference that has been drawn, viz., that title to lands lying under meandered bodies of water on school land grant sections is precluded from passing by virtue of the various school land grant acts under some other doctrine of law. That is not the case.

The United States transferred title to the beds of navigable bodies of water within a particular state to that state upon its admission to the Union, but retained title to the beds of nonnavigable bodies of water. *United States v. Oregon*, supra; *United States v. Utah*, 283 U.S. 64 (1931); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Scott v. Lattig*, 227 U.S. 229 (1913).

The generally accepted doctrine is that the bed of a nonnavigable lake is usually deemed to be the property of the adjoining landowners. 12 *Am. Jur.* 2d § 15 *Boundaries* (1964). When disposing of the uplands, the United States is free to retain any part of the riverbed, and whether or not it has done so is a question of intent. *Oklahoma v.*

Texas, supra. There is, however, a strong presumption that the owner intends to convey all the land he owns under the water. 12 *Am. Jur.* 2d, supra. This Department has held that an unrestricted patent issued by the Government conveying public lands abutting a nonnavigable lake in the State of Montana carries with it absolute riparian title to the lakebed. *William Erickson*, 50 L.D. 281 (1924); See *Grayce R. Hiler*, A-27370 (December 19, 1956); see also *Clayton Phebus*, 48 L.D. 128 (1921), to the extent that it was not overruled by *Erickson*, supra. A conveyance by the United States should be construed and given effect according to the law of the State in which the land lies, unless the United States expresses an intention to the contrary. *United States v. Oregon*, supra; *Oklahoma v. Texas*, supra; *Brewer-Elliott Oil & Gas Company v. United States*, 260 U.S. 77 (1922).

Under the common law and decisions of the United States Supreme Court, a grant of land bounded on a nonnavigable river carries the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. *United States v. Elliott*, 13 F.2d 720, 723 (10th Cir. 1942). Such an intention is not made manifest merely by the fact that a fractional section is surveyed only to the meander line. In *Grayce R. Hiler*, supra, this Department held that title to the beds of nonnavigable

lakes passed to the State of New Mexico along with the abutting lots, but that this fact can nowise affect the computation of future indemnity selections by the State.

The following is quoted from *United States v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946); *aff'd, sub nom. Oklahoma v. United States*, 331 U.S. 788, *rehearing denied*, 331 U.S. 869 (1947):

Grants by the United States of its public lands bounded on streams or other waters, navigable or nonnavigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumed the position of a private owner, subject to the general law of the state. * * * At 773.

Under the rules of common law, unless a contrary intention appears or is clearly inferable from the terms of the grant, the grantee of land, bounded by a nonnavigable stream [lake] or river, acquires title to land to the center or thread of the water, on the theory that the grantor will not be presumed to have reserved a strip of land covered by water which will be of no practical value to him. At 774.

In *Hardin v. Jordan*, 140 U.S. 371, 384 (1891), the Court said, " * * * In our judgment, the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

In *Whitaker v. McBride*, 197 U.S. 510, 512 (1905), it was held that a patentee from the United States government has all the rights

of a riparian owner in the non-navigable channel lying opposite his banks. The Court also held in that case that:

* * * A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Company v. Schurmeir*, 7 Wall 272; *Hardin v. Jordan*, 140 U.S. 371; *Horn v. Smith*, 159 U.S. 40.

The common law is embodied in these principles and we see no reason for a departure from them.

In *United States v. Oregon*, *supra*, the United States brought suit against the State of Oregon to quiet title to lands underlying non-navigable lakes within the meander line boundary. Regarding subdivision B of the Narrows (one of the lakes in question) it was determined that prior to the commencement of the suit, the United States had disposed of all its interests in the uplands bordering on the meander line on both sides to private patentees and to the state as indemnity lands under the school land grant to Oregon. The Court, agreeing with the Master's recommendation, held that the United States retained no interests in the lands within the meander line boundary, since 43 U.S.C. § 931 (1970), provides that in all cases where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both. The State was also held to be owner in fee simple of certain lands within the

meander line of Mud Lake, incident to its ownership of patented uplands contiguous with the meander line. These holdings are in accord with traditional concept of the common law that riparian title to the lakebed passes with title to the upland.

The ownership of lands within the meander lines fronting the Sand Reef and Harney Lake were also in question. Oregon claimed the land as incident to the ownership of the adjacent upland school section. The claim, however, was rejected because the Executive Order of August 18, 1908, which set aside the land in question for a bird reserve, predated the approval of the survey of the upland. The Executive Order imposed a reservation, thereby preventing the State from acquiring an interest in the lands within the meander line upon this frontage as incident to its ownership of the upland. Again, we find no conflict with the common law right of riparian owners. The reason why the land within the meander line did not pass to the State was because it had been effectively withdrawn. Thus the case in issue can be distinguished from the *Oregon* case as there has been no withdrawal of lakebed land in the present case.

Another portion of the frontage on Harney Lake discussed in the *Oregon* case consisted of school lands which passed to Oregon under a survey approved *before* the Executive Order. The State had claimed and received lieu lands else-

where for a deficiency in granted school lands which deficiency lay within the meander line. The Court held at 10-11 as follows:

* * * [T]he acceptance by the State of lands elsewhere, in lieu of lands lying within the meander line adjacent to the granted uplands, was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands as an incident to the grant of uplands, as to preclude the assertion of that claim here.

Therefore, the United States retained the entire interest in the area within the meander line of Lake Harney except such interest as was acquired by an individual patentee of the upland who was not party to the suit.

That holding is precisely applicable to the case here under consideration. On the basis of the rule in the *Oregon* case, we hold that Montana's selection and acceptance of other lands in lieu of the lands within the meander line constituted a relinquishment of any interest in the lands underlying Horseshoe Lake as included in the grant of the upland portion of the school section, or riparian thereto, and precludes any assertion of the State claim to such lands.

We find that a meander line is not a line of boundary, although it may be given that effect by the withdrawal, reservation, exception or relinquishment of lands which border thereon. To the extent that *Ree H. Baker, supra*, is inconsistent with this opinion it is in error, and we overrule it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is vacated and the case is remanded to the State Office for further action consistent with this opinion.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

**ESTATE OF MARCEL ARCASA
(DECEASED COLVILLE, ALLOTTEE
NO. H-120)**

2 IBIA 309

Decided *May 30, 1974*

Petition to reopen.

Granted and remanded.

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

The requirement of the Administrative Procedure Act, that all decisions of an Examiner shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, is mandatory and applicable in all decisions of Examiners in Indian Probate proceedings.

270.1 Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

The Indian Reorganization Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the tribe having jurisdiction over such lands and the legal heirs of the testator.

375.0 Indian Probate: Reopening: Generally

Although the superintendent of an Indian agency has no interest in the outcome he is a proper official of the Bureau of Indian Affairs to file a petition for reopening, under the authority of 43 CFR 4.242.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

An Administrative Law Judge is without power to reopen a case after the passage of three years from the date the Judge enters his order, but the Secretary is not bound by the limitations of 43 CFR 4.242 and he has the authority at any time to review on proper grounds.

APPEARANCES: Albert M. Rennie, Superintendent Flathead Agency, petitioner, pro se. No appearance for appellees.

*OPINION BY
ADMINISTRATIVE JUDGE
WILSON*

*INTERIOR BOARD OF
INDIAN APPEALS*

The above-entitled matter comes before this Board on a petition to reopen dated July 2, 1973, filed by Albert M. Rennie, Superintendent, Flathead Agency, Ronan, Montana.

An order was entered in the above-entitled matter on August 11, 1969, by Administrative Law Judge R. J. Montgomery, wherein he approved the last will and testament of Marcel Arcasa, hereinafter

(DECEASED COLVILLE, ALLOTTEE NO. H-120)

May 30, 1974

referred to as testator, dated July 27, 1953.

In paragraph SECOND of said last will and testament the testator devised his inherited interests on the Flathead Reservation, Montana, to his daughter, Marguerite Arcasa Lentz and his granddaughters, Marcella Grace Lentz and Josette Finley Lentz.

It is the foregoing devise to the granddaughters only which is the subject of the petition herein. The petitioner, although having no interest in the outcome, is a proper official of the Bureau of Indian Affairs to file a petition for reopening under the provisions of 43 CFR 4.242. *Estate of Rose Josephine LaRose Wilson Eli*, 2 IBIA 60, 80 I.D. 620 (1973).

In support of the petition to reopen the petitioner alleges,

1. The Order Approving Will, dated August 11, 1969, No. E-105-69, does not comply with the Indian Reorganization Act (25 U.S.C. 464). The Billings Area Title Plant, at my request, obtained for me the complete probate file, including family history and testimony verifying that Marcella Grace Lentz Redthunder and Josette Finley Lentz Osborne, granddaughters of the decedent, are not heirs at law. Neither are they enrolled members of the Confederated Salish and Kootenai Tribes. The complete probate file was received at Flathead Agency, April 10, 1973.

The Confederated Tribes of the Salish and Kootenai Tribes of the Flathead Reservation, Montana, voted to accept the provisions of the Act of June 8, 1934 (48 Stat. 984, 25 U.S.C. § 464). Accordingly,

any devise of lands on that reservation would be subject to the provision of section 4 of said Act, *supra*, which in short prevents testamentary disposition of realty interests on an organized reservation to anyone who is neither an heir at law of the testator nor a member of the tribe having jurisdiction of the land in question. *Solicitor's Opinion*, 54 I.D. 584 (1934).

The Judge in his Order Approving Will, dated August 11, 1969, fails to make findings as to whether the grandchildren in question are eligible to take the Flathead interests under the will either as (1) heirs at law of the testator or (2) as enrolled members of the Flathead Reservation.

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, makes it mandatory that all decisions of a Judge in Indian probate proceedings include a statement of findings and conclusions, on all material issues of fact, law or discretion presented on the record. *Estate of Rose Josephine LaRose Wilson Eli*, *supra*.

In view of the failure of the Judge to make the above-mentioned findings, the petition to reopen should be granted and the matter remanded to the Judge for further proceedings and disposition along the lines hereinafter indicated.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reopen is hereby

GRANTED and the matter is hereby REMANDED to the Administrative Law Judge for the purpose of conducting, after due notice of reopening and hearing to all interested parties, a hearing to:

(1) determine whether the grandchildren in question are eligible to take the Flathead interests under the will either as heirs at law of the testator or as enrolled members of the Flathead tribes, and if not, (2) to determine the heirs, in accordance with Montana Laws of Interstate Succession (in the absence of a residuary devisee in the will of July 27, 1953), as to the lapsed Flathead interests devised to said grandchildren and (3) to issue an appropriate order or decision consistent with the evidence adduced in said hearing subject to the right of appeal set forth in 43 CFR 4.291.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

UNITED MINE WORKERS OF
AMERICA, DISTRICT NO. 15,
LOCAL UNION 9856

V.

CF&I STEEL CORPORATION

3 IBMA 187

Decided May 31, 1974

This matter is before the Board on appeal by CF&I Steel Corporation (CF&I) from a decision of an Admin-

istrative Law Judge (Docket No. DENV 73-111), issued on October 4, 1973, allowing in part, an Application for Compensation filed by United Mine Workers of America, District No. 15 (UMWA), in behalf of certain miners employed by CF&I at its Allen Mine.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Generally

Although the miners are the real parties in interest they may be represented by United Mine Workers of America in an action brought under section 110(a) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

Immediately upon the issuance of an order of withdrawal a claim of compensation arises.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Generally

The validity of a section 104(a) withdrawal order is not in issue in a proceeding under section 110(a) of the Act.

APPEARANCES: David R. Phipps, Esq., for appellant, CF&I Steel Corporation.¹

OPINION BY ADMINISTRATIVE CHIEF JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

*Factual and Procedural
Background*

¹ UMWA did not participate in this appeal.

This is purely a dispute between the aggrieved miners and the operating company.

The operative facts necessary to a disposition of this appeal are not in dispute and have been established, basically, by stipulation of the parties. The facts are as follows:

At approximately 1 p.m. on November 10, 1972, a roof fall occurred in the No. 1 entry of the 6th panel East section of CF&I's Allen Mine. The area of the roof that fell was about 15 or 16 feet long by about 10 feet wide. No other area of the mine was affected by the roof fall. The entry where the roof fall occurred was entered and examined shortly after the accident by CF&I personnel. The roof fall was not occasioned by an explosion or a fire. Two men were killed by the roof fall.

After proper notification, a Mining Enforcement and Safety Administration (MESA) Inspector arrived at the Allen Mine, entered the foreman's room on the surface and advised the superintendent that he was ordering closure of the entire mine and issued an order of withdrawal pursuant to section 104 (a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).² When asked by the superintendent why he was closing the whole mine when only one section was involved, the inspector replied that, "my instructions are when a

fatality occurs, we shut down the entire mine." (Tr. 36.)

The Order of Withdrawal states:

* * * the undersigned duly authorized representative of the Secretary of the Interior, upon making an inspection of the above-named mine on this date finds that the following described condition or practice exists in the mine:

Two fatalities have occurred resulting from a roof fall accident in 6 Panel Main South Section. This closure order is issued pending the completion of an investigation to determine the cause of the accident and means to prevent a similar occurrence.

The Order also recited that it was issued because "an IMMINENT DANGER EXISTS" and that it was issued under section 104(a) of the Act.

Upon issuance of the Order, the operator removed all personnel from the mine.

During the period of time between the roof fall and the issuance of the withdrawal order, no MESA personnel entered the mine.

Shortly after issuance of the withdrawal order, on November 10, 1972, CF&I considered seeking review thereof pursuant to section 105 of the Act. However, before an application for review was filed a meeting was held between representatives of CF&I and MESA in order to determine the latter's position with respect to the nature and scope of the withdrawal order. At this meeting, "they (MESA) indicated to us (CF&I) that the withdrawal order, it's (*sic*) normally issued after a fatal accident has occurred,

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

and that this same order might be withdrawn, vacated." (Tr. 43.) No application for review of the closure order was filed by CF&I.

On December 12, 1972, the MESA inspector issued an Order vacating the withdrawal order of November 10, 1972, after a thorough investigation " * * * disclosed that the cause of said accident was not the result of any failure on the part of management; * * *."

On December 26, 1972, UMWA, pursuant to section 110(a) of the Act, filed with the Office of Hearings and Appeals, an Application for Compensation on behalf of the miners who were idled by the closure order. This Application claimed compensation for the miners on the "A" shift who were idled for a portion of that shift, and for those on "B" shift who were idled for that entire shift. The parties (UMWA and CF&I) reached an agreement as to the identity of the men who were working on the "A" shift, their rate of pay, the period of time they were idled, and the amount due each individual miner; (Ex. D) and reached a similar agreement as to the "B" shift. (Ex. E.)

A full hearing was held on June 5, 1973 at Denver, Colorado, and the Judge rendered his decision on October 4, 1973, in which he granted compensation to the individual miners that he determined were idled by the withdrawal order pursuant to section 110(a) of the Act.

Issues Presented on Appeal

A. Whether UMWA has standing to prosecute this action in a representative capacity for the use and benefit of the miners, who are the real parties in interest, under section 110(a) of the Act.

B. Whether a withdrawal order issued pursuant to section 104(a) of the Act but not in compliance with the requirements thereof, and subsequently vacated, will support a claim for compensation pursuant to section 110(a) of the Act.

Discussion

A.

In its appeal to this Board, CF&I does not contend that the UMWA is not "an authorized representative of miners" as that term is used in the Act and in 43 CFR 4.560 of the regulations, or that UMWA has not been authorized by the individual miners to represent them in this claim for compensation. Its contention is that every action must be maintained by and in the name of the real party in interest (individual miners) and therefore, UMWA had and has no standing to participate in this proceeding as a "representative action."

This Board, in *United Mine Workers of America, District No. 31*, 1 IBMA 31, 48, 78 I.D. 153 (1971), recognized that miners idled by a withdrawal order are the proper statutory parties to institute a proceeding for compensation. We

also acknowledged that when certain conditions were met, UMWA could appear as an authorized representative of the idled miners.

Under the circumstances of this case, where the record reflects the names of those miners, their rate of pay, the number of hours idled by the closure order and that UMWA is an authorized representative of those idled miners, we are of the opinion this contention of CF&I is without foundation in fact or law. Consequently, we hold that UMWA was properly acting as the authorized representative of the idled miners in this case.

B.

Basically, the contention of CF&I in this issue is that a *valid* section 104(a) closure order is a condition precedent to establish a claim for compensation under section 110(a) of the Act.

Section 110(a) of the Act provides:

If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal mine or area of a coal mine is closed by

an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 104 of this Act, all miners employed at the affected mine who would be withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

In *United Mine Workers of America, supra*, at pp. 41, 158, we stated in pertinent part:

* * * Regardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104, and the miners are officially idled by such order. * * * (Footnote deleted.)

Admittedly, in that case, the Board had before it a 104(a) withdrawal order determined to be valid; however, we believe the same conclusion must be reached even though the withdrawal order may subsequently be found to have been improperly or mistakenly issued. The fact remains that the miners

were withdrawn and idled by an order issued by MESA.

As this Board has previously held in *United Mine Workers of America, supra*, at pp. 44-45, and 160:

* * * An order issued pursuant to section 104 is a prerequisite to any claim for compensation under section 110(a) and the withdrawal order must be alleged by a miner or miners seeking compensation under this section. It appears inherent in the terms of this section that immediately upon the issuance of an Order of Withdrawal, a claim for compensation arises. * * * Thus, this section provides a method by which miners may enforce the mandatory payment of compensation provided them by the Act where they have been idled by an order of withdrawal.

We do not view a compensation proceeding under section 110(a) as a review proceeding within the legal sense or purview of a section 105 review proceeding; nor do we construe this section as providing an alternate review procedure to that provided in section 105. * * * Therefore, a challenge to the withdrawal order by either the miners or the operator in a section 110(a) proceeding is inappropriate. * * *

No cogent reason has been advanced by CF&I to cause us to alter the view we have taken in the past. Therefore, we find that CF&I's contention on this issue must be rejected. Accordingly, we hold that the miners idled by the MESA order in this case are entitled to claim compensation under section 110(a) of the Act.

One other matter raised by CF&I deserves comment. In *Zeigler Coal Corporation*, 1 IBMA 71, 78 I.D. 362, CCH Employment Safety and

Health Guide, par. 15,371 (1971), we stated in pertinent part:

* * * Additionally, there are consequences flowing from the issuance of an order of withdrawal, such as loss of production and the operator's liability for compensation to miners under section 110 of the Act, which require that the operator be given an opportunity to obtain a decision on review as to whether an inspector's findings underlying his issuance of an order of withdrawal were correct. * * * (pp. 78-79, 366.)

CF&I appears to rely heavily upon our decision in *Zeigler, supra*, to support its contention that a right to compensation is premised upon a valid order of withdrawal. In our view such reliance is misplaced. When the afore-cited portion of *Zeigler* is considered in context with the express provisions of section 110(a), we think it is clear that our language in *Zeigler* was directed to and pertained to a withdrawal order "for an unwarrantable failure of the operator to comply with any health or safety standard." This is manifest when consideration is given to the portion of section 110(a) which authorizes a hearing on the compensation to be paid. *Zeigler* must be read in conjunction with *United Mine Workers of America, supra*, which preceded it where we held: "It appears inherent in the terms of this section that immediately upon the issuance of an order of withdrawal a claim of compensation arises." We did not and do not intend by judicial fiat or *sub silentio* to overrule our afore-cited holding in *United Mine Workers of America*.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge IS AFFIRMED.

IT IS FURTHER ORDERED that CF&I Steel Corporation pay to the miners the compensation as de-

termined by the Judge to each of the miners listed in this decision on or before thirty days from the day of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.
Alternate Administrative Judge.

CONSOLIDATION COAL COMPANY*

3 IBMA 161 Decided May 15, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from an order by an Administrative Law Judge (Judge), dated October 16, 1973, dismissing Docket Nos. MORG 72-95-P, MORG 72-43-P, MORG 72-91-P, and MORG 72-104-P due to MESA's refusal to comply with the Judge's order of September 12, 1973.

Vacated and remanded.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge lacks authority to order MESA to submit a recomputed penalty assessment to an operator.

APPEARANCES: J. Philip Smith, Esq., Assistant Solicitor, and Edward J. Rodzinak, Esq., Trial Attorney for appellant, Mining Enforcement and Safety Administration; Richard McMillan, Jr., Esq., for appellee, Consolidation Coal Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Board finds that an Administrative Law Judge (Judge) issued an order requiring the Mining En-

forcement and Safety Administration (MESA) to submit proposed penalty assessment, recomputed according to the assessment formula put into effect on April 24, 1973, after the decision in *National Independent Coal Operators Association v. Morton*, 357 F. Supp. 509 (1973).¹ The decision of the Board in the case of *Clinchfield Coal Company*, 3 IBMA 154, 81 I.D. 276, CCH Employment Safety and Health Guide, par. 17, 812 (1974), controls the issue here. In *Clinchfield* we concluded that a Judge lacked authority to order MESA to recompute proposed penalty assessments under the new formula.

Accordingly, the order requiring recomputation and the ensuing order of dismissal must be vacated.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the order dismissing the above-entitled dockets IS VACATED and the proceedings

¹ This case has been reversed in *National Independent Coal Operators Association v. Morton*, No. 73-1678 (D.C. Cir. February 11, 1974) with the Court holding that the Secretary need not prepare a formal decision on a proposed assessment "where no hearing is requested by the operator and no issues are in dispute." The District Court's decision in *NICOA*, *supra*, has been supported by the recent decision in *Morton v. Delta Mining, Inc.*, No. 73-1752 (3d Cir. March 20, 1974) holding contrary to District of Columbia Circuit Court of Appeals.

*Not in Chronological Order.

ARE REMANDED to the Administrative Law Judge.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

**AUTHORITY TO DETERMINE
ELIGIBILITY OF NATIVE
VILLAGES AFTER
JUNE 18, 1974***

Statutory Construction: Generally

Although there may be no general rule for distinguishing between mandatory and directory provisions, a statute should be construed according to its subject matter and the purpose for which it was enacted, and the intention of the legislature should be controlling.

Statutory Construction: Administrative Construction

Where a statute directs that administrative action be taken within a stated time frame, but indicates no consequences for failure to comply with the time limit provided, it is necessary to distinguish between the action and the time frame.

**Statutory Construction: Generally—
Statutory Construction: Legislative History**

To deny status as an eligible village to persons in fact entitled to that status would be an unjust and unfair denial of a right specifically granted by Congress, as evidenced in the legislative history.

Act of December 18, 1971 (43 U.S.C. § 1601-1624)

To deny a legislative determination of

village eligibility because of a delay caused by the very magnitude of the problem that Congress felt necessary to confront would be contrary to the essence of the settlement itself.

Statutory Construction: Administrative Construction

The timetable set forth by Congress in the Act of December 18, 1971, is at best an estimate of time reasonable enough to accomplish the basic purposes of the act.

M-36876

May 29, 1974

**OFFICE OF THE
SOLICITOR**

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: AUTHORITY TO DETERMINE ELIGIBILITY OF NATIVE VILLAGES AFTER JUNE 18, 1974.

There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Sutherland, *Statutory Construction*, Section 25.0., Volume 1A, 4th Edition. If the legislature considers the provisions sufficiently important that exact compliance is necessary, then the provision is mandatory. But if the statute is merely a guide for the conduct of business and for orderly procedure, rather than a limitation of power, the provision will be construed as directory only. *French v. Edwards*, 13 U.S. (Wall.) 506 (1871), *John C. Winston Co. v. Vaughan*, 11 F.Supp. 954 (Okla. 1935), *affirmed* 83 F.2d 370 (10 Cir. 1936).

Subsection 11(b)(2) of the

*Not in Chronological Order.

VILLAGES AFTER JUNE 18, 1974

May 29, 1974

Alaska Native Claims Settlement Act (ANCSA) 85 Stat. 688, 700, December 18, 1971 provides:

Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b) (1) hereof, and a village shall not be eligible for land benefits under subsections 14(a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—

Subsection 11(b) (3) provides:

Native villages not listed in subsection (b) (1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act, determines that—

The language of these two subsections dealing with determinations by the Secretary of the eligibility of both listed and unlisted villages does not dictate that the two and one-half year time provision is mandatory or directory.

Although there may be no general rule of thumb for distinguishing between mandatory and directory provisions, a statute should be construed according to its subject matter and the purpose for which it was enacted, and the intention of the legislature should be controlling. Sutherland, *supra*. "Consideration must be given to the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and finally, whether or not

there is a public or private right involved." *Wilcox v. Billings*, 200 Kan. 654.

Before any conclusions can be drawn on whether or not the two and one-half year provision is mandatory or directory, it is necessary to distinguish between the action which the Secretary is directed to complete under subsections 11(b) (2) and (3) and the time period during which he must complete such action. There can be little argument that the Secretary must complete a review of all the listed villages, and that such a review is mandatory and essential to the purposes of the legislation. Furthermore, the Secretary is directed to make determinations of the eligibility of both listed and unlisted villages. The question at hand, however, is whether or not June 18, 1974, is in fact, a "deadline" after which the Secretary can make no further determinations of village eligibility.

The legislative history makes it clear that it was the intent of Congress "to see that all villages—whether listed in the Act or not—which meet the requirements are granted lands under this Act." Senate Report No. 92-405, pages 138-9. Furthermore, lands surrounding the villages, whether listed or unlisted, are withdrawn "to insure that these lands are protected from disposition to other parties pending a determination of the villages eligibility for benefits under the Act." *supra*, at 136.

Congress intended that *all* villages eligible for benefits should be granted these benefits and specifically insures their protection before final determination through the withdrawal procedures. At the same time, however, Congress intended that *only* those villages which meet the requirements of subsections 11(b) (2) and (3) can receive these benefits and insured that result by requiring the Secretary to make a final determination of the eligibility of each listed and unlisted village before the benefits are conferred upon these villages.

While it may be difficult to distinguish between the action directed and the time frame provided, it is necessary to make that distinction here. Because the statute may be classified for some purposes as directory does not mean that for all purposes it can "be ignored at will." *Borough of Pleasant Hills v. Carroll*, 182 Pa. Super. 102. The Secretary must complete certain actions under subsections 11(b) (2) and (3); the question is whether or not he can exceed a time frame which may be directory only. It should be noted at this point that the differences between mandatory and directory, between the imperative and the permissive, represent a continuum involving matters of degree instead of separate, mutually exclusive characteristics, Sutherland § 25.04., and that the distinctions may not be as finely drawn as wished.

As a rule, a statute prescribing the time within which public officers

are required to perform an official act regarding the rights of others, and enacted with a view to the proper, orderly and prompt "conduct of business," is directory unless it denies the exercise of the power after such time, or the phraseology of the statute, or the nature of the Act to be performed and the consequence of failing to do it at that time are such that the designation of time must be considered a limitation on the power of the officer. When the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory. If the statute is directory, the legislative intention is to be complied with as nearly as practicable. Therefore, a statute requiring a public body, merely for the orderly transaction of business, to fix the time of performance of certain acts which may as effectively be done at another time is usually regarded as directory. 67 C.J.S. Officers, Section 114 (b).

Statutory provisions fixing the time for performance of acts may be either mandatory or directory, in accordance with the legislative intent and will ordinarily be held directory where there are not negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay. On the other hand, such provisions are to be taken as mandatory where consequences attach to the failure to comply; and where the act concerns vested rights,

procedure or other similar matters, the statute is generally mandatory. 82 C.J.S. Statutes, Section 379.

In the determination of whether time provisions should have mandatory or directory effects there is an outstanding example of statutory construction not on the basis alone of ascertaining the actual intent of the legislature, but on the grounds of policy and equity to avoid harsh, unfair or absurd consequences. Although these considerations may be couched in terms of legislative intent, it is apparent that the decision rests on an inference of what the legislature can be presumed to have intended had it anticipated a situation that may have arisen in a particular case. Sutherland, *supra*, at Section 57.19.

It may be difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons, founded in fairness and justice, time provisions are often found to be directory merely, where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. It has been aptly stated that "when there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; [when there is] no presumption that, by allowing it to be done, it may work an injury or wrong; [when there is] nothing in the act itself * * * indicating that the legis-

lature did not intend that it should rather be done after the time prescribed than not done at all—the courts will deem the statute directory merely." *State v. Industrial Commission*, 233 Wis. 461.

A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation on the power of the officer. Sutherland, *supra*.

The language of the two and one-half year provision contained in both subsections 11(b)(2) and 11(b)(3) is neither directory nor mandatory on its face. With respect to listed villages the two and one-half year provision would appear to limit the time within which the Secretary must review all the listed villages and make a determination of the eligibility of each village listed. With respect to unlisted villages, the same provision would limit the time within which the Secretary may determine an unlisted village eligible for benefits under the Act.

The mere language of these subsections can in no way resolve the ambiguity of the time provision. A time provision cannot be mandatory "unless it both expressly requires an agency or public official to act within a particular time period and specifies consequences for failure to comply with the time provision." *Fort Worth National Corp. v. Federal*

Savings and Loan Insurance, Corp., 469 F.2d 47 (5th Cir. 1972). No "express requirements" can be read into either of these provisions.

It is necessary, therefore, to determine the legislative intent relating to this particular provision and to the Act as a whole. Whether the language of a statute is imperative or merely permissive depends on the intention as disclosed in the nature of the Act. *Ballou v. Kemp*, 92 F.2d 556 (1937). The intent of the act controls, and when the spirit and purposes of the act require the words to be construed as permissive, it will be done. *Antonopoulos v. Aerojet-General Corporation*, 295 F. Supp. 1390 (D.C. Cal. 1968). "Whether a statutory requirement is mandatory in the sense that failure to comply therewith vitiates the action taken, or directory, can only be determined by ascertaining the legislative intent." *Vaughn v. John C. Winston Co.*, 83 F.2d 370 (1936).

The legislative history on this particular provision is in no way helpful, as there is no mention made either of the two and one-half year provision, or of mandatory or directory time requirements in general. It may only be said that, if there is no substantial reason why the determinations by the Secretary might not well be done after June 18 as before, there is nothing in the legislative history to indicate that the legislature did not so intend, and therefore the provisions will be deemed directory. *Diamond Match Company v. United States*, 181 F. Supp. 952 (1960).

In order to determine legislative intent of the Act and in order to put the subsections 11(b) (2) and (3) in perspective, it is necessary to examine language relating to these subsections and to other provisions in the Act which contain time limits.

The definition of "Native Village" in section 3(c) contains no requirement that the Secretary make his determination of eligibility within two and one-half years; the only prerequisite under the definition is that the group "meets the requirements of this Act," and that "the Secretary *determines* [it] was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, *who shall make findings of fact in each instance*), composed of twenty-five or more Natives."

The Alaska Native Claims Settlement Act does, however, contain language which clearly contains mandatory time requirements. These express requirements require the Secretary to act within a particular time period and specify a consequence for failure to comply with such time limit. These requirements are clearly mandatory. *Fort Worth Nat. Corp., Id.*

Paragraph 17(d) (2) (B) provides that:

Lands *withdrawn* pursuant to paragraph (A) hereof *must be withdrawn within nine months* of the date of enactment of this Act. All unreserved public lands *not withdrawn* under paragraph (A) or subsection 17(d) (1) *shall be available for selection by the State and for appropriation under the public land laws.* (Italics added.)

May 29, 1974

Unmistakably the time period imposed here is mandatory. The *Secretary* must act within a certain time or a penalty is imposed.

Likewise, paragraph 17(d) (2) (C) provides:

Every six months, for a period of two years from the date of enactment * * *, the Secretary shall advise the Congress * * * and submit his recommendations * * *. *Any lands withdrawn pursuant to paragraph (A) not recommended for addition to or creation as units of the National Park, * * * Systems at the end of the two years shall be available for selection by the State and the Regional Corporations, and for appropriation under the public land laws.* (Italics added.)

Paragraph 17(d) (2) (D) provides:

*Areas recommended by the Secretary pursuant to paragraph (C) shall remain withdrawn from any appropriation * * * until such time as the Congress acts on the Secretary's recommendations, but not to exceed five years from the recommendation dates. The withdrawal of areas not so recommended shall terminate at the end of the two year period.* (Italics added.)

It is obvious that Congress is explicit when it intends that a particular time provision be mandatory. Not only is the requirement expressly set forth; a consequence for failure to abide by such a schedule is specified.

Furthermore, the withdrawals which are accomplished for purposes of village eligibility do not automatically expire two and one-half years from date of enactment if the Secretary fails to make his

determinations of eligibility. Paragraph 22(h) (1) provides that all withdrawals shall terminate within four years of date of enactment, except that withdrawals for the Southeast villages (section 16) shall terminate three years from date of enactment. Therefore, the fact that such withdrawals run substantially past the two and one-half year period and that such withdrawal does not terminate automatically indicates that the two and one-half year period is directory. Furthermore, the Secretary is given the authority in paragraph 22(h) (4) to terminate any withdrawal when he determines that the withdrawal is no longer necessary to accomplish the purposes of the Act. Such authority is discretionary and not triggered by the lapse of a two and one-half year period.

Paragraph 22(h) (3) specifically states that the terminations of withdrawals set forth in section 22 do not apply to section 17, which is the one section of the Act where the Secretary is burdened with mandatory time schedules and specific penalty provisions. The failure of section 22 to make any provisions for the withdrawals authority contained in subsections 11(b) (2) and (3) is therefore significant. If the two and one-half year period were intended to be mandatory, section 22 would have stated that the withdrawal provisions which call for termination in three or four years would specifically not apply to subsections 11(b) (2) and (3).

The Act does set forth a definite time schedule and a series of guidelines for purposes of precipitating an orderly and prompt settlement. The Secretary is, for example, directed to divide Alaska into 12 regional corporations within one year, to complete enrollment within two years, to make a (2) (c) study within three years, to convey lands immediately after selection by patent, to submit annual reports. And it is clear that Congress intended that the settlement be completed in as prompt and orderly a fashion as possible. Subsection 2(b) provides that "the settlement should be accomplished rapidly, with certainty, * * * without litigation * * *." But it is important to note that the only provisions relating to acts by the Secretary which are expressly mandatory and which contain a penalty clause are those contained in section 17.

When no consequences attach to failure to comply, when no penalty is imposed for delay, and when there are no negative words restraining the doing of the Act after the time specified as contained in paragraphs 17(d) (2) (B), (C) and (D), the courts will deem the statute directory merely. *Diamond Match, Id.*; *Fort Worth, Id.*

Where there is no substantial reason why the determination required by subsections 11(b) (2) and (3) might not well be done after June 18 as before June 18 and where there is no indication that the Congress did not so intend, then the designation of time shall not be

considered a limitation on the power of the Secretary. His power to exercise such determinations is not denied after June 18. If the determinations of village eligibility are made after June 18, the purpose of the statute will have been substantially complied with and no substantial rights jeopardized. *Sutherland*, § 25.03.

§ 7(a) provides that:

* * * the State of Alaska shall be divided by the Secretary within one year after the date of enactment of this Act into twelve geographic regions * * *.

Although the Secretary was directed to complete his division of the State within one year, he was unable to complete this task within the time frame set forth by Congress. Stipulations were made by the Regional Corporations and the Secretary after the time period had passed. These agreements were approved by the Courts in *Arctic Slope v. Doyon and Morton*, Civil No. A-38-73 (D. Alaska, April 1973), *Ahtna, Inc. v. Doyon and Morton*, Civil No. A-198-72 (D. Alaska, August 1973), thereby giving express judicial approval of a Secretarial determination after the time period set forth by Congress in the Act itself.

Furthermore, § 5, which directs "the Secretary [to] prepare within two years from the date of enactment of this Act a roll of all Natives * * *," requires that the roll "show for each Native the region in which he resided on the date of the 1970 census enumeration." In order for the Secretary to undertake the prep-

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aration of the roll, he needed to ascertain the regional boundaries. The one determination is dependent on the other; similarly, a delay in the former necessarily caused a delay in the initiation of the latter. But the courts, realizing the complexities of the problems involved and the necessity for a certain and just determination at each step in this long procedure leading to final resolution of the settlement, recognized that the time frame cannot be imposed in such a manner that the very interests protected by the Act would suffer because of a slight delay in the implementation of its provisions.

The preparation of the roll was completed by December 18, 1973, as provided in § 5. The magnitude of that undertaking caused many administrative difficulties. The possibility of error, through fraud or mistake, in preparation of the roll cannot be denied. The Secretary has the power, after notice and an opportunity to be heard, to strike from the roll names placed thereon through fraud or mistake, *Garfield v. Goldsby*, 211 U.S. 249 (1908), *Campbell v. Wadsworth*, 248 U.S. 169 (1918). This power exists even though the roll has been made "complete," *Lowe v. Fisher*, 223 U.S. 95 (1912).

Under § 12(a)(1), the Village corporations are given a period of three years in which to select, in accordance with rules established by the Secretary, the acreages to which the village is entitled under § 14(b)

and provides that the villages shall make additional selections for land which the Regional Corporation shall reallocate from acreage included in the difference between twenty-two million acres and the total area selected by the eligible villages pursuant to 12(a). No time period is set by the Act for this differential selection by the villages, but the Secretary has construed § 12(b) as allowing the villages four years to make such selections and has provided in 43 CFR § 2651.4(f), the villages a four year period in which to file their applications for these selections. The Secretary further provides in § 2651.4(f) that villages may file applications in excess of their total entitlement.

Again the statute has set a three year period for land selections by Village Corporations. The Secretary has required that the filing of appropriate applications be within this three year period, and the applications for differential acreage within four years, but has made allowance for the settlement and adjudication of these crucial rural land selections for a later time. Land selections can be made contemporaneously with determinations of the village eligibility and the Secretary has so provided in order to facilitate the quickest solution to a tremendously complex situation. The end result is that the land selection process moves forward contemporaneously but separately from the determinations of village eligibility. Furthermore a

delay in determination of village eligibility will neither delay nor interfere with the selection of lands by the villages.

There is nothing to indicate that Congress did not intend that the determination should be made by the Secretary after June 18 rather than not done at all. If Congress had intended to dissolve the Secretary's authority to make such determinations of village eligibility after June 18, it would have been explicit in denying him the exercise of that authority after the two and one-half year period. The Secretary retains his authority over the withdrawals for either three or four years, or until such time as he determines that the withdrawal is no longer necessary to accomplish the purposes of the Act. And it is settled Departmental policy that the Secretary may exercise his authority over lands that are still within his control as part of the public domain. *B. E. Burnaugh*, 67 I.D. 366 (1960).

Where the time or manner of performing the action directed by statute is not essential to the purpose of the statute, provisions in regard to time or method are generally interpreted as directory only. *Sutherland*, Section 25.04. It cannot be said that Congress intended that the time frame set forth in the Act is to be disregarded or to be taken lightly. Such a framework was imposed for the purposes of orderly and prompt processing of the settlement package. In the one sense, the time frame must be considered an essential part of the statute; at the

same time, however, the time limits do not dictate strict compliance where the broad purpose of the legislation would be sacrificed. The particular time provision in question does not go to the substance of the act to be completed, namely the determination of those villages eligible for benefits under the terms of the settlement, and therefore is directory. *Vaughn*, Id.

In the absence of direct evidence of legislative intent with regard to this particular provision, it is appropriate to ascertain what Congress would have intended had it anticipated the situation at hand. It is difficult to imagine that Congress would have intended that the determinations of village eligibility should suffer because the Secretary could not meet the tremendous statutory burden imposed upon him within a certain time frame. Neither should persons be denied or granted village status by default, nor should decisions of eligibility be made in such a cursory fashion that the rights of all parties to the settlement should suffer. Congress did not intend that a slight "overrun" should prejudice private rights or the public interest. Because a delay in the determination of village eligibility is allowed under the overall framework of the Act, because a delay would not hamper the workings of the other provisions, because proper allowances can be made for such a delay without prejudicing the interests of those party to the settlement, it would seem inconceivable to precipitate deliberation by for-

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feiture or by hasty procedures, at the expense of one of the most basic provisions of the Act, namely, the determination of village eligibility. To impose any other solution would be contrary to the spirit of the Act.

It has been argued repeatedly that the Settlement Act must be liberally construed in favor of the Natives at all points. It should be noted, however, that the cases cited for this proposition deal with a concept and a relationship that is distinctly different from that involved in this Act. The court in *Squire v. Capoeman*, 351 U.S. 1 (1956) discusses "the traditional guardian-ward relationship between the United States and the Indians" and quotes from *Carpenter v. Shaw*, 280 U.S. 363 (1930) as follows:

* * * Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. * * * "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense" [quoting in turn from *Worcester v. The State of Georgia*, 6 Pet. 515 (1832)].

As is emphasized time and time again in the legislative history of the Settlement Act, Congress intended the Act to be "a more just and, hopefully, a wiser resolution than has been typical of our country's history in dealing with Native people in other times and in other

states." Senate Report 92-405, pages 61-62. "The settlement of Alaska Native land claims is to be final and complete and the present legislation intends to avoid prolonged legal or property distinctions or implications of wardship based upon race," *supra*, at 80. Furthermore, the Declaration of Policy in § 2(b) states that:

The settlement should be accomplished rapidly, . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship.

This settlement is unique and the Natives are party to this settlement in a manner that makes their relationship with the Federal Government distinct and distinguishable from their traditional wardship status in the Lower-48.

Although the argument that legislation dealing with Natives must be liberally construed in favor of the Natives does not apply to the Settlement Act because the Act is a settlement among three parties, is a unique piece of legislation designed to solve a unique problem, and is intended by Congress expressly to be a completely different solution to a separate and distinct problem, it must be kept in mind that if an improper village is considered eligible because of a hasty determination by the Secretary, that village will unjustly benefit at the expense of the other valid villages. The few will benefit undeservedly, and at the expense of the many. Under § 14(a)

of the Act, the qualified villages will receive patent to the lands selected under § 12 (a) and (b). The total amount of land allocated to the villages is 22 million acres and villages that would qualify because the Secretary was unable to make a proper determination of eligibility would be depriving valid, qualified villages of their differential land under § 12(b). The Native villages are entitled to 22 million acres of land, period. It would be unfair for the Secretary to distribute land to a village that, in fact, should not qualify as a village at the expense of those villages which Congress intended be granted specific benefits apart from those associations of people who could qualify only as groups under the Act (§ 3(d)).

It is obvious that the converse, to wit, the denial of status as an eligible village to a number of persons in fact entitled to that status, would be an unjust and an unfair denial of a right specifically granted to those qualified by Congress.

Furthermore, under § 12(a) (1), an improperly qualified village may select lands from within National Wildlife Refuge Systems, National Forests and from lands tentatively approved to Alaska under the Statehood Act. If these selections were ultimately conveyed to an unqualified village, the State, a specific party to the settlement, would suffer unjustly. In addition, if lands were improperly conveyed from within National Wildlife Refuges and National Forests, such a conveyance would be in direct

conflict with the purposes of paragraphs 17(d) (2) (A) and 22(e) which specifically provide for additions to such systems. These additions were considered necessary by Congress in providing for the public interest and the interests of the Federal Government as the third party to this settlement.

The settlement must be accomplished rapidly and without litigation. It is clear by the very nature of the Act that Congress intended "the certainty, the flexibility and the detail of a legislative settlement rather than a judicial settlement." Senate Report, 92-405, *supra*, at 62. To deny a legislative determination of village eligibility because of a delay caused by the very magnitude of the problem that Congress felt necessary to confront would be contrary to the essence of the settlement itself. Congress would not have intended that the proper determination of something as basic as village eligibility be thwarted by a slight delay in the implementation procedures.

The settlement is unique. Years of effort and study created this complex but final solution to an insoluble problem. It is certain that Congress did not intend that the implementation procedure be so precise that the very rights of those it had labored to protect be subject to the vagaries of the judicial process. It is inconceivable that Congress could have considered that the complexities and magnitude of the problem would vanish in the face of orderly procedural guidelines. In

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those instances where Congress felt that time periods must be imposed, it provided the appropriate penalties for failure to meet such deadlines. But where guidelines were imposed for the purposes of activating the most rapid procedures possible under the burdensome circumstances, Congress did not see fit to bridle the Secretary beyond any reason.

In *United States v. Morris*, 252 F. 2d 643 (5th Cir. 1958), a migrant labor agreement between the United States and the Republic of Mexico whereby United States guaranteed that employers would pay the prevailing wage rate or contract rate, whichever was higher, required that a "joint determination" that the United States agricultural employer had failed to pay the prevailing wage rate be concluded within ten days. The court held that the ten day requirement was directory only and that a determination concluded some 23 days later was a valid determination.

The court's discussion of the Agricultural Act of 1949 and its legislative intent is appropriate to the Settlement Act and the question at hand.

This procedure for joint determination covered many areas of possible controversy in addition to this simpler question of the actual wage paid in comparison to the administratively determined "prevailing wage." With workers scattered over the wide geographical area of this agricultural employment,

the scheme of adjustment calling for adjudication by the two sovereigns through selected representatives, each of whom had other governmental duties to perform, and the nature of potential disputes comprising many of substantial complexity and controversy, it is not reasonable to believe that these two Governments intended, by this language, to establish a procedural remedy that would fail altogether for any case, no matter how serious or aggravated, which was incapable of resolution within ten days. On the contrary, these considerations suggest strongly that the ten-day limitation was directory, not mandatory, and prescribed out of recognition that two independent sovereigns with no coercive sanctions available were pledging each other to handle these complaint proceedings with dispatch, that neither would needlessly delay them, and as a specific target, the period of ten days would normally be sufficient.

Whether construed as a statute, or a treaty, or a statutorily authorized contract we discern no intention to adhere to literalism. It is not decisive and must give way to the purpose otherwise so clearly revealed. * * *

The problems confronted by the Secretary in administering the Alaska Native Claims Settlement Act are of substantial complexity and controversy. It is unreasonable to believe that Congress intended for determinations of village eligibility either to fail or be hastily made because they were incapable of resolution within two and one-half years. Congress intended that the Secretary proceed with dispatch in administering the Act, within the time framework set forth by Congress. Needless delays must be avoided and the schedule

must be used as a guideline, but not at all costs.

The timetable set forth by Congress is at best an estimate of time reasonable enough to accomplish the basic purposes of the Act. Two and one-half years was the specific target date set forth by Congress, but it cannot be blindly met, at the expense of the basic purposes of the act, namely a proper and reasoned settlement for once and for all of long-standing disputes between the Natives, the State of Alaska and the Federal Government.

KENT FRIZZELL,
Solicitor.

**QUARTO MINING COMPANY
AND
NACCO MINING COMPANY**

3 IBMA 199 Decided June 19, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from an initial decision by an Administrative Law Judge (Docket Nos. VINC 74-62, 74-63 and 74-69), dated February 13, 1974, vacating three Orders of Withdrawal.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

In an application for review of a section 104(a) order, the order is properly vacated where the operator, by a preponderance of the evidence, proves that imminent danger was not present when the order was issued.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and W. Hugh O'Riordan, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Timothy M. Biddle, Esq., for appellees, Quarto and Nacco Mining Companies.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The procedural and factual background of this case is adequately set forth in the Administrative Law Judge's (Judge) decision.¹

As we review the record, there is nothing that would tend to establish the probability of imminent danger. As a matter of fact all of the surrounding circumstances would support at most a bare possibility that such a condition could exist. On the other hand, the evidence adduced by the operators clearly overcame this bare possibility and in our view preponderates, *i.e.*, an imminent danger condition did not exist at the time the Orders were issued.

In our opinion the record fully supports the Judge's conclusion that these Orders were issued to bring about more rapid compliance with the cited safety standard and not because of the presence of an imminent danger. The record contains substantial evidence to the effect that when an inspector observes a "wheel parked on a cable" (in accordance with his instructions) he is required to issue a 104(a) withdrawal order

¹ The Judge's decision follows, 3 IBMA 203.

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and that if he didn't he would have to justify such a failure to his supervisor.

This Board in the past has held that a 104(a) order of withdrawal is to be issued only where imminent danger is found to exist (*United Mine Workers of America, District #31 v. Clinchfield Coal Company*, 1 IBMA 31, 78 I.D. 153 (1971)). In *Freeman Coal Mining Corp.*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973), we determined, *inter alia*, that the determination of whether imminent danger is present in a given situation, is that the cited condition or practice would be the conclusion by a reasonable man that imminent danger existed at the time of issuance of a 104(a) withdrawal order. Imminent danger is defined in section 3(j) of the Federal Coal Mine Health and Safety Act of 1969² to be "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Applying the foregoing to the circumstances in this case we find imminent danger was not present. Accordingly, we conclude that the Orders of Withdrawal were properly vacated by the Judge.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by

the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge issued February 13, 1974, IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

H. J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

DECISION

3 IBMA 203

February 13, 1974

This is a review proceeding under section 105(a) of the Federal Coal Mine Health and Safety Act of 1969. The operators, Quarto Mining Company and Nacco Mining Company, seek to have Orders of Withdrawal No. 1 RWU, October 23, 1973; 1 JET, October 24, 1973; and 1 RWU, October 12, 1973, vacated. The Mining Enforcement and Safety Administration (MESA) and the United Mine Workers of America have filed answers in opposition to the applications for review.

Hearings on the applications were held in the U.S. Tax Courtroom, Federal Building, Pittsburgh, Pennsylvania, on January 7, 1974. The operators were represented by Timothy M. Biddle, Esq., Washington, D.C. MESA was represented by Hugh O'Riordan, Esq., Office of the Solicitor, Washington,

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

D.C. The UMWA was not represented at the hearing.

Issue

The issue is whether or not an imminent danger existed at the time the orders of withdrawal in question were issued by Inspectors Uhazie and Turkal.

Pertinent Law, Regulations and Instructions

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists. [30 U.S.C. § 814 (a); Section 104(a) of the Act.]

"(I)mminent danger" means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. [30 U.S.C. § 802(j); Section 3(j) of the Act.]

Trailing cables shall be adequately protected to prevent damage by mobile equipment. [30 CFR 75.606.]

Unprotected cables that are run over by any type of mobile equipment would be in noncompliance with this section and would warrant the issuance of a 104(a) Order of Withdrawal. [Section 75.606 of Coal Mine Safety Inspection Manual, September 1972.]

Summary of Evidence

The Orders of Withdrawal involved in these cases were issued on three separate days. The first, issued

by Inspector Uhazie on October 23, 1973, at the Powhatan Mine No. 4, stated that:

No. 4 shuttle car—was parked on the energized trailing cable of the No. 5 shuttle car operating in the Main West section.

The second order, issued by Inspector Turkal at the Powhatan No. 6 Mine on October 24, 1973, reads as follows:

The serial number 52 scoop car being operated by E. Martin, scoop car operator, and being supervised by G. Brown, section foreman, was trammed over the energized trailing cable provided for the serial number 91471-1 roof bolting machine located 30 feet in by survey station 65 plus 75 in No. 4 entry of Main South section.

The third order, issued November 12, 1973, by Inspector Uhazie, reads as follows:

The No. 4 roof bolting machine was observed parked with one wheel sitting on an energized trailing cable of the auxiliary exhaust fan located in the last open crosscut between the Nos. 2 and 3 entries of the 2 Right off 1 Main North section.

Each order of withdrawal was terminated by requiring the operator to cut out the portion of the cable that had been run over, and by installing a permanent splice.

The particular facts set out in the orders of withdrawal were not seriously contested by the applicants. The trailing cables were, in fact, run over by rubber-tired equipment in contravention of 30 CFR 75.606. There was unanimity among the witnesses that no hazardous conditions such as methane gas accumu-

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lations, ventilation failures, etc., were present at the time the orders of withdrawal were issued. The inspectors testified that they considered the possibility of sharp objects being on the floor of the mine which might have damaged a run-over cable, but there was no testimony that the floor contained, in fact, any such sharp objects.

Inspectors Uhazie and Turkal testified that prior to October 1973, it had been standard practice to issue 104(b) notices whenever a trailing cable was run over by mobile equipment. Thereafter, orders of withdrawal were issued on the premise that this practice placed mine employees in imminent danger. Both inspectors testified that they did not feel bound by instructions in the Coal Mine Safety Inspection Manual for Underground Mines, September 1972, section 75.606, which provides that orders of withdrawal under section 104(a) shall be issued when mobile equipment is run over unprotected cables. Both inspectors testified that they had been instructed to require the operators to cut out a section of an energized cable that had been run over by mobile equipment, or to require the operator to remove the cable from the mine for testing. Inspector Turkal testified that when mobile equipment runs over a de-energized cable, a section 104(b) notice is issued and there is no requirement that the cable be spliced. The inspectors insisted that neither the issuance of the orders, nor the termination requirement, were in

the nature of penalty sanctions against the operator.

Although witnesses for MESA steadfastly insisted that running over trailing cables results in an imminent danger, there was no convincing testimony put on by MESA as to the expected result of this practice. No witness testified that he had seen a mine employee killed or injured simply because a rubber-tired wheel had run over a cable. The contention was that this practice might possibly cause a rupture, which might then result in a short, which then might produce a fire. Or, that a wire might be bared, which could result in electrocution. Although the MESA witnesses testified that they expected the cable to be ruptured, they also testified that such an event was a possibility, not a probability. Very few hard facts were brought into evidence regarding the dangers incident to running over trailing cables.

Mr. Roy E. Jones, electrical inspector for MESA, testified that government records from 1952 to 1972 showed that 33 reportable mine fires were directly attributable to equipment running over trailing cables. Mr. Jones was testifying from memory, and no documents were submitted in evidence to support this statement. Furthermore, Mr. Jones did not report a single instance of death or injury resulting from the 33 fires which he claimed resulted from the practice of running over cables. Mr. Jones testified that inspectors were not ordered to issue section 104(a) orders whenever

a cable is run over, but he conceded that the inspectors had been told that they should do so. He further testified that he would issue such an order each and every time an energized cable is run over, and that he had given explicit instructions to inspectors "that this is the route they would take."

In the opinion of witnesses for the operator, no imminent danger results when a cable is run over by mobile equipment. The requirement by MESA that a section of the cable must be cut out when run over by mobile equipment creates even a greater hazard in their opinion. A spliced cable, in their view, is not as safe as an unspliced cable. The operators put in evidence test data showing that the cables used in the mines in question were able to withstand being run over hundreds of times by 20,000-pound trucks and 16-ton forklifts with no damage to the cables. In the view of witnesses for the operators, the possibility of damage to a cable by being run over is extremely remote. MESA made no attempt to rebut the test data put in evidence by the operators.

Discussion

The overwhelming weight of the evidence in these cases establishes that no imminent danger existed at the time the orders were issued. It is clear that these orders were issued to bring about better compliance with a particular safety standard, and that the requirement that a cable be spliced if run over when energized is nothing more than added punishment to the operator. At times the

testimony of the government's witnesses approached sheer sophistry. For example, why must an operator cut out a section of a cable run over when energized, when no such requirement is made when a deenergized cable is run over? If the inspectors are not bound by instructions, then why were notices issued prior to October 1972, and orders for the same violation thereafter? What meaning is to be given to the testimony of Inspector Jones, who stated that inspectors are not required to issue orders of withdrawal for violations of 30 CFR 75.606, when he also testified that he had given explicit instructions that "this is the route they would take"?

The practice of running over unprotected trailing cables is a clear violation of a particular mandatory safety standard. However, no credible evidence in the record shows that the violations in the cases at hand presented any imminent danger to mine employees. Section 104(a) orders are not to be issued, willy-nilly, for violations of safety standards. The language of section 104(a) and section 3(j) is clear, cogent, and concise: there must be a reasonable expectation that death or injury will result before a condition or practice can be abated.

It is obvious to layman and lawyer alike that an operator is deprived of certain fundamental rights when section 104(a) orders are issued for the sole purpose of enforcing specific safety standards. Should such an order be ignored, then the operator is subject to crim-

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inal sanctions under section 109(b). A section 104(a) order inflicts an immediate economic penalty on the operator by way of lost production and compensation for idled mine employees. There is no opportunity for the operator to question the propriety of such an order through the hearing process or through appeals to the Board or to the courts. Through ultra vires instructions to inspectors, MESA has attempted to give inspectors the authority to inflict a penalty on the operator for violation of a standard. This policy, if pursued, could be extended to each and every mandatory safety standard in the Act. Such a policy can only result in contempt for the law in the long run.

There may be certain factual situations that are always imminently dangerous. The Act implies, for instance, that a methane reading of 1.5 percent requires the issuance of a section 104(a) order. *See* section 303[h][2]. The Secretary may well have the authority to promulgate regulations which call for the issuance of section 104(a) orders under given circumstances. Nevertheless, there is no present authority for MESA to instruct inspectors to issue such orders for violations of safety standards if the violations do not create an imminently dangerous situation.

ORDER

Orders of Withdrawal No. 1 RWU, issued October 23, 1973; No. 1 JET, issued October 24, 1973; and No. 1 RWU, issued November 12,

1973, are hereby ordered VACATED.

GEORGE PAINTER,
Administrative Law Judge.

EASTERN ASSOCIATED COAL CORPORATION

3 IBMA 208

Decided June 19, 1974

Appeal by Eastern Associated Coal Corporation from a decision by an Administrative Law Judge dismissing an Application for Review of an imminent danger withdrawal order in Docket No. HOPE 73-300.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

The Interior Board of Mine Operations Appeals will affirm the dismissal of an Application for Review of a section 104 (a) withdrawal order where the Judge's findings of fact are supported by substantial evidence and he has correctly applied the legal definition of imminent danger.

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; J. Philip Smith, Esq., Assistant Solicitor and Michael T. Heenan, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Eastern Associated Coal Corporation (the operator) appeals to the Board to reverse a decision by Administrative Law Judge Paul Merlin dismissing its Application for Review of an imminent danger withdrawal order issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(a), 83 Stat. 750 (1970). The closure order in dispute cited the operator for alleged accumulations of loose coal and coal dust spanning an area approximately 690 lineal feet.

Judge Merlin's decision, which we are appending to this opinion, contains detailed findings of fact, which are amply supported by numerous citations to the record, as well as explicit determinations of weight and credibility. We are of the opinion that his factual judgments were based upon substantial evidence and that the operator has shown no compelling reason to set them aside.

Having duly considered and rejected the operator's appellate challenge to the Judge's factual conclusions, it is the judgment of the Board that at the time the closure order was issued, a reasonable man was warranted in concluding that the condition cited constituted a proximate peril to life and limb and that if normal operations designed to extract coal proceeded, a disaster could reasonably be expected to occur before abatement. We hold, therefore, that the Judge correctly decided that the operator failed to prove that there was no imminent danger. *Freeman Coal Mining Cor-*

poration, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

DECISION

3 IBMA 211 *September 4, 1973*

I. Introduction

This is a proceeding filed under section 105(a) of the Federal Coal Mine Health and Safety Act by Eastern Associated Coal Corporation to review an order of withdrawal issued by an inspector of the Mining Enforcement and Safety Administration (formerly Bureau of Mines and hereafter referred to as MESA) under section 104(a) of the Act for imminent danger. A hearing was held on July 16, 1973.

In its application for review the applicant has alleged that the withdrawal order in question is invalid because an imminent danger did not exist. In its answer MESA admitted issuance of the order in question but alleged that the order was properly issued. The United Mine Workers of America which

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under the regulations is a party also answered alleging that the order was issued as the result of an imminent danger.

The order of withdrawal in question recites that loose coal and coal dust were accumulated for about 690 lineal feet, as scaled on a map, in the Nos. 1, 2, 3 and 4 entries and connecting crosscuts on the 4 Right 1 North sections. The order further sets forth that an imminent danger existed in that the condition or practice described could reasonably be expected to cause death or serious physical harm before such condition or practice could be abated. (Resp's. Exh. 1.) A termination of the order of withdrawal, Termination Order No. 1 EJF dated September 7, 1972, which was also attached to the application for review was issued at 11 a.m., on September 7, 1972, stating that the condition or practice cited had been abated and that the loose coal and coal dust accumulations were loaded and removed from the mine and the areas were adequately rock-dusted. (Resp's. Exh. 3.)

II. *Applicable Law*

Section 104(a) of the Act provides that if upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection

(d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

Section 3(j) of the Act provides that imminent danger means the existence of any condition or practice in a coal mine which reasonably could be expected to cause death or serious physical harm before such condition or practice can be abated.

The Board of Mine Operations Appeals has held that the burden of proof in a proceeding for review of an imminent danger order of withdrawal is upon the applicant-operator. *Lucas Coal Company*, 1 IBMA 138, 142, 79 I.D. 425, CCH Employment Safety and Health Guide par. 15,378 (1972). Proof of violation is not necessarily an element of proof of an imminent danger. *Id.* The Board has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from the normal work activity. *Eastern Associated Coal Corp.*, 2 IBMA 128, 136, 80 I.D. 400, CCH Employment Safety and Health Guide par. 18,078 (1973).

III. *Evidence*

Mr. Eugene J. Farley, an inspector for MESA, was qualified and

accepted without objection as an expert on mine health and safety matters (Tr. 50). Mr. Farley testified that he issued Order of Withdrawal No. 1 EJJ, dated September 6, 1972 (Tr. 48). The area affected by the order was the four entries in 4 Right 1 North section of the Keystone No. 1 Mine (Tr. 5-6). Mr. Farley stated that conventional mining techniques were used at the Keystone No. 1 Mine (Tr. 13, 54).

Mr. Farley stated that he arrived at the Keystone No. 1 Mine on September 6, 1972, at 3 p.m. (Tr. 4). He checked the firebooks for 30 minutes whereupon he took the mantrip at 3:30 p.m. (Tr. 4). After descending into the mine, he took another 30 to 35 minutes to arrive at the 4 Right 1 North section (Tr. 6). Mr. Farley estimated that his arrival time at the section was from 4:30 to 4:40 p.m. (Tr. 26).

Mr. Farley described the section as having four 260 foot entries with three cross-cuts connecting the entries (Tr. 8). The first entry had not advanced as far as the other three entries (Tr. 8). He estimated that the total linear feet of all entries and of the cross-cuts was approximately 690 feet (Tr. 8). Mr. Farley stated that upon arrival in the section he noted that coal was being produced (Tr. 7). He did not remember if preparations were being made to fire shots but he remembered that coal was being loaded and equipment was energized (Tr. 13, 31, 53). In the ordinary course of operations, shots would have been fired later in the shift (Tr. 57). He observed accumulations of coal dust

and of loose coal in the section which he measured with a ruler and which ranged in depth from zero to six inches in depth in all four entries and the cross-cuts (Tr. 7-9). Very few points in the section had zero accumulations (Tr. 9). Mr. Farley also noticed that the ribs were rock-dusted and that the section was dry except for a damp spot in the area of the belt feeder (Tr. 11). He recorded no methane in the section, found no permissible deficiencies in the equipment and found that the trailing cables, which were energized, were in good condition (Tr. 13). He did not know the composition of the mine floor but did believe that if there was any shale in the accumulations there was very little (Tr. 12).

Mr. Farley testified that when he issued the order there were two possible sources of ignition. One was the possibility of machinery running over the trailing cables and the other was a blown-out shot (Tr. 19, 32). In his opinion, there was a good likelihood that the trailing cables could be run over (Tr. 53). He believed it would take a substantial time to clean up the accumulations in question (Tr. 32), and he stated that he issued the order of withdrawal because he did not want coal production being carried on during that period due to the danger of possibly running over cables and shooting (Tr. 32). According to Mr. Farley's testimony, there was a policy of the Bureau of Mines to the effect that any accumulation which would take more than 30 minutes to

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abate required issuance of a section 104(a) withdrawal order, but Mr. Farley stated that the issuance of such an order of withdrawal was based upon the inspector's judgment and that in this case he used his own judgment (Tr. 23). In this particular situation he stated that he did not think of the 30 minute rule because he knew it would be impossible to clean up the accumulations in that period of time (Tr. 24). He followed the manual and used his own judgment (Tr. 26).

Mr. Farley further testified that he took dust samples from the floor (Tr. 16-17). The results of the samples were read into the record (Tr. 28). Mr. Farley stated that he was not required to take samples in this type situation but that he did so to satisfy himself (Tr. 17). The sampling occurred after he issued the withdrawal order and did not enter into his determination at the time with respect to whether or not an imminent danger existed (Tr. 63).

Mr. Samuel D. Farmer, a safety supervisor for Eastern Associated at the Keystone No. 1 Mine was accepted without objection as an expert in mine health and safety matters (Tr. 34). Mr. Farmer testified that he did not personally observe the conditions cited in the withdrawal order (Tr. 34, 40). Mr. Farmer described the composition of the floor of the section in question as consisting of soft streaks of shale which could fall off in sheets and be ground up on the mine floor during mine operation traffic (Tr. 35-36). He stated that from four to fifteen

inches on the floor regularly broke up (Tr. 35-36). In addition, Mr. Farmer stated that a binder seam of rock had been encountered in this section (Tr. 34-35). The shooting of this seam pulverized substantial amounts of rock which were left behind. In addition, shale from the ribs could loosen and fall to the floor where it would be pulverized (Tr. 35). Mr. Farmer further stated that in his mining experience he has never seen, heard of, or witnessed a situation where an accumulation of coal dust was ignited as a result of firing a shot, except in experimental movies (Tr. 36). Mr. Farmer stated that the explosive conditions in experimental movies would not exist in a coal mine (Tr. 36, 44). He further believed it was unlikely that coal dust accumulations on the mine floor would ignite (Tr. 42-43). He expressed the view that no heat is generated when a shot is fired since the powder is detonated by a low voltage battery (Tr. 39). Finally, Mr. Farmer stated that the Keystone No. 1 Mine constantly liberated methane and had been classified as gassy prior to the 1969 Act (Tr. 45).

III. Findings and Conclusions

The testimony of Mr. Farley with respect to the conditions cited in the order of withdrawal is uncontradicted. Thus, the record discloses no dispute that there were accumulations ranging up to six inches in depth for 690 linear feet in the entries of the section in question; that the mining equipment was ener-

gized; and that coal was being loaded. In addition, there is no evidence in the record to dispute Mr. Farley's estimate that it would take a long time to clean up the accumulations. Mr. Farley testified that he believed that there was a danger to safety and life because the accumulations could be ignited if the trailing cables which were energized, were run over by the machinery. It is recognized that there were no permissibility violations and that there were no splices in the trailing cables. However, in Mr. Farley's opinion, there was a good likelihood the trailing cables could have been run over. His judgment in this respect also was not challenged. In addition, Mr. Farley testified that during the course of the shift shots would be fired a number of times and that this too, created danger of an explosion. His testimony regarding the firing of shots similarly was not challenged.

In light of the foregoing, this Administrative Law Judge concludes that an imminent danger existed and that the subject order of withdrawal was properly issued. As set forth *supra*, section 3(j) provides that an imminent danger exists when it can reasonably be expected that death or serious physical injury will result before the condition can be abated. Here the accumulations of coal together with the substantial possibility of ignition (resulting either from the good likelihood of cables being run over or from the firing of shots both of which were part of normal opera-

tions) created the reasonable expectation of death or serious physical injury from an explosion before abatement could be achieved.

Moreover, the inspector reasonably believed it would take many hours to clean up the accumulations. Normal operations which would have occurred during that long period, including the continuous running of the machinery, and the firing of several shots, amounted to a serious risk which in the view of this Administrative Law Judge constituted a reasonable expectation of death or serious physical harm before abatement (see *Eastern Associated Coal Corporation, supra*).

There was evidence adduced at the hearing that the Bureau of Mines has a policy requiring issuance of an order of withdrawal for imminent danger whenever an accumulation of coal or coal dust would take more than 30 minutes to clean up. However, Mr. Farley testified that he did not take into account that policy because in this case the cleanup would require much longer. After listening to the testimony and reviewing the administrative transcript, this Administrative Law Judge is satisfied that Mr. Farley sufficiently understood the principle of imminent danger and correctly exercised his judgment in this case.

Mr. Farley apparently took samples of the coal dust accumulations. The results of these samples were read into the record without objection. Subsequently, counsel for the operator objected to admission into

the record as an exhibit of the report setting forth the results regarding incombustibility obtained from testing these samples. It is not necessary to rule upon counsel's objection because this Administrative Law Judge believes that the samples and the results obtained therefrom are immaterial to a determination of imminent danger in this case. At most, the results could serve only as an after-the-fact justification for the order. The validity of an order of withdrawal for imminent danger must however, be judged in terms of the reasonableness of the judgment which the inspector made at the time he issued the order.

The principal evidence supporting the operator's contention that no imminent danger existed is the testimony of Mr. Farmer. However, since Mr. Farmer was not present on the section covered by the withdrawal order, his testimony is not entitled to as much weight as that of the inspector. For instance, Mr. Farmer testified regarding the break-up of shale in this section of the mine; but he did not, and indeed could not, contest Mr. Farley's conclusion that the accumulations in question were coal not shale. This Administrative Law Judge does not find persuasive Mr. Farmer's testimony regarding the incombustibility of coal but his testimony even if believed, would not be sufficiently probative because it is not based upon, and does not specifically relate to the facts of this case.

As was held at the hearing, the burden of proof is upon the applicant. This holding is compelled by the Board of Mine Operations Appeals (see *Lucas Coal Company, supra*). This Administrative Law Judge concludes that the applicant has failed to sustain its burden of proof. However, in light of the evidence and testimony presented in this case, the Findings and Conclusions set forth herein would not be different if the burden of proof had been placed on MESA.

The memoranda and other materials filed by the parties have been reviewed. To the extent they are inconsistent with the Findings and Conclusions set forth herein, they are rejected.

ORDER

It is hereby ORDERED that the application for review herein be and is hereby DISMISSED.

PAUL MERLIN,
Administrative Law Judge.

ZELPH S. CALDER

16 IBLA 27

Decided June 20, 1974

Appeal from a May 31, 1973, decision by the Utah State Office, Bureau of Land Management, imposing rental charges for right-of-way application U-10278.

Vacated and remanded.

**Applications and Entries: Generally—
Rights-of-Way: Act of March 3,
1891—Rights-of-Way: Applications**

A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected.

**Applications and Entries: Generally—
Rights-of-Way: Act of March 3,
1891—Rights-of-Way: Applications**

Pursuant to a regulation, applications to acquire a right-of-way for the main purpose of irrigation should be made under the Act of March 3, 1891.

**Public Lands: Generally—Rights-of-
Way: Generally—Water and Water
Rights: Generally**

Federal laws govern the rights a holder of a state water right has to inundate federal lands for a portion of a reservoir.

**Rights-of-Way: Act of March 3,
1891—Rights-of-Way: Conditions and
Limitations**

A reservoir right-of-way under the Act of March 3, 1891, does not give the grantee exclusive fishing or stock-watering rights in the reservoir over federal lands. Fish culture or stock-watering is not a public use nor an authorized subsidiary use of a right-of-way under the Act of March 3, 1891, as amended.

**Rights-of-Way: Act of March 3,
1891—Rights-of-Way: Conditions and
Limitations**

There is no rental charge for the uses authorized by a right-of-way approved under the Act of March 3, 1891.

APPEARANCES: H. Byron Mock, Esq., of Mock, Shearer and Carling, Salt Lake City, Utah, for appellant.

Eleanor S. Lewis, Esq., Office of the Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for appellee.

*OPINION BY
ADMINISTRATIVE JUDGE
THOMPSON*

*INTERIOR BOARD OF LAND
APPEALS*

Zelph S. Calder has appealed from a decision by the Utah State Office, Bureau of Land Management (BLM), dated May 31, 1973, which concluded that Calder's right-of-way application U-10278 could be approved under the Act of February 15, 1901, 43 U.S.C. § 959 (1970). The decision notified Calder that advance permission given on February 20, 1970, to use and occupy public land for a reservoir right-of-way had expired, and requested that he submit rental in the amount of \$240 for the period from February 20, 1970, to February 19, 1974, or that he pay \$260 for the five-year rental period ending February 19, 1975.

On November 9, 1969, Zelph Calder requested advance permission to begin construction of a reservoir which would inundate government-owned lands. He indicated he would file a right-of-way application for the affected lands, and stated the reservoir construction was under the authority and jurisdiction of the State Engineer of Utah. On December 11, 1969, Zelph and Tessie Calder filed a joint application for a right-of-way to im-

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pound water on the Pot Creek for irrigation purposes in a reservoir which would inundate land in the south half of section 15, T. 1 S., R. 24 E., S.L.M., Uintah County, Utah. The application estimated the capacity of the reservoir to be about 1500 acre-feet with less than ten percent covering federal land. Included with the application was a copy of a letter granting Calder the right to appropriate water under Utah law. The copy of the application to the State stated that they would use the right-of-way primarily for irrigation, but would also use it for stock-watering and fish culture. On February 20, 1970, BLM granted Calder advance permission to construct a reservoir and to use and occupy federal lands for one year. The February 20 notice expressly provided that the grant of advance permission was not a commitment that the right-of-way application would be approved.

On March 20, 1972, Calder amended the application to include the use of fish culture under the authority of the Act of February 15, 1901, 31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970). On September 27, 1972, BLM authorized a right-of-way for a commercial fish hatchery and for irrigation under the Act of February 5, 1901, upon payment of a rental charge mentioned above of \$60 for one year or \$260 for five years.

Calder objected to this disposition of his application. He stated that the main purpose of the reservoir was for irrigation and that he

felt the right-of-way could be granted under the Act of March 3, 1891, *as amended*, 43 U.S.C. § 946 *et seq.* (1970). BLM reconsidered its decision by letter of May 31, 1973, clarifying that one of the proposed uses was for fish culture, not for a fish hatchery, but it reiterated its position that the right-of-way could be granted only under the 1901 Act. Calder appealed in a letter dated June 13, 1973, in effect, contending that the application is allowable under the 1891 Act without a rental charge.

On September 5, 1973, counsel filed an appearance on Calder's behalf, and requested that the case be returned to the BLM office in Utah for his personal review. On September 18, 1973, we ordered the case file to be returned to Utah for counsel's inspection. The file has now been returned to this office and both appellant's counsel and the Regional Solicitor have filed briefs.¹

Appellant's counsel argues five major points in his brief. One, Calder's rights under the 1891 Act "vested upon his filing [application] U-10278 and filing the required maps to show his completion of work." Two, contrary to BLM's conclusion, the main purpose of the reservoir is for irrigation, not fish culture, and as a result, any application for a reservoir must be made

¹The Regional Solicitor objects to our considering counsel's brief on the grounds it was not timely filed. Supplemental briefs can be considered by this board in our discretion where a timely statement of reasons has previously been filed, and the briefs are served upon an adverse party. 43 CFR 4.414.

under the 1891 Act. Three, only 7.8 acres out of approximately 70 acres are BLM land and the BLM land will be inundated only when full storage for irrigation water is achieved. Therefore, Calder's use of reservoir waters over private lands for secondary purposes of stock-watering and fish culture does not require a BLM permit. Four, in any event, fish culture and stock-watering are permissible subsidiary uses under the 1891 Act. Five, if a separate permit is required under the 1901 or other Act for the secondary uses, that permit may be obtained separately. The brief also notes that a grant under the 1891 Act is preferable to a 1901 right-of-way because it gives the grantee more security of time and investment.

In response to appellant's argument that a right-of-way under the 1891 Act has already vested, BLM's reply brief correctly notes that the right-of-way does not vest until all requirements have been met and the Secretary of the Interior has approved the application. The Secretary's approval is a prerequisite to the vesting of the grant of a right-of-way under the 1891 Act. *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 231 (D.C. Cir.), cert. denied, 299 U.S. 562 (1936); *United States v. Rickey Land & Cattle Co.*, 164 F. 496, 500 (C.C.N.D. Cal. 1908); *Rimrock Canal Co.*, 9 IBLA 333, 343, 80 I.D. 197, 200 (1973). The Secretary may withhold his approval if the grant is not in the public interest or he

may condition the grant to ensure that the public interest will be protected. *Solicitor's Opinion*, M-36500 (May 5, 1958).

The decision giving advance permission for construction expressly withheld approval and reserved a final determination. This negates the vesting of a right contrary to the conditions for the advance permission to construct.

Appellant's second argument is that contrary to BLM's conclusions, the main purpose of the project is irrigation, not fish culture, and as a result, the irrigation right-of-way application must be made under the 1891 Act.

Calder's original application stated that the main use of the right-of-way would be irrigation. Calder still asserts that the original application is correct, and that although it did not so state, it was intended to be made under the 1891 Act. Calder's letter of March 20, 1972, amended his original application to include fish culture and referred to the 1901 Act. In view of the clarification in the appeal that this was not to suggest that the main purpose was not for irrigation but only to include rights for fish culture, as BLM personnel had suggested, the primary intended use of the right-of-way appears to be for irrigation. This leads to the next issue. Does an applicant for a right-of-way which will be used mainly for irrigation need to apply for a right-of-way under the 1891 Act? The answer is yes.

A Departmental regulation directs that:

* * * (1) All applications where it is sought to acquire a right-of-way for the main purpose of irrigation, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. 946-949), and section 2 of the act of May 11, 1898 (30 Stat. 404; 43 U.S.C. 951), must be submitted under the 1891 and 1898 acts, in accordance with the applicable regulations in this part.

43 CFR 2873.1(b)(1). BLM is bound by the regulation and should have adjudicated the right-of-way application for *irrigation* under the 1891 Act.

We now turn to the problem of the other uses of the reservoir. Appellant has contended that no other federal permit or right-of-way is needed for fish culture and stock-watering and that the BLM decision interferes with state law. First, we point out that there is no interference with the State's jurisdiction to decide who may appropriate and control water. Instead, the questions pertain to what rights an applicant may have to store or divert that water over federal land. The use, controls, occupancy, and disposition of federal lands, including a right-of-way for the inundation of those lands by water acquired under state laws, must be governed by federal laws. U.S. Const., Art. IV, Sec. 3, cl. 2; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404, 411 (1917).

The Department of the Interior is charged with the duty to administer all public lands, including those pertaining to rights-of-way

for irrigation purposes. *United States ex rel. Sierra Land & Water Co. v. Ickes*, *supra*; *United States v. Rickey Land & Cattle Co.*, *supra*; *Rimrock Canal Co.*, *supra*. Cf. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 337 (1963). See also, *Board of Commissioners, City and County of Denver*, A-27748 (October 13, 1959). Therefore, what rights appellant may have to inundate federal lands for a reservoir are circumscribed by federal laws. This leads to a consideration of those laws.

Appellant contends that BLM can grant a right-of-way under the 1891 Act where its main use is irrigation, and its secondary uses are for fish culture and stock-watering. A right-of-way granted under the unamended 1891 Act could be used for only one purpose—irrigation. Act of March 3, 1891, §§ 18, 21, 26 Stat. 1101, 1102, 43 U.S.C. §§ 946, 949 (1970). "Irrigation" was interpreted to mean "the reclamation of arid lands so they may be capable of producing ordinary crops." *South Platte & Reservoir Co.*, 20 L.D. 464, 465 (1895). Before the Act was amended, the Department rejected applications for rights-of-way which, in addition to being used for irrigation, would also be used for electric power generation, *H. H. Sinclair*, 18 L.D. 573 (1894); public water supply, *South Platte & Reservoir Co.*, *supra*; floating timbers and other industrial uses, *Chaffee County Ditch & Canal Co.*, 21 L.D. 63 (1895); and domestic

and industrial purposes, *William Marr*, 25 L.D. 344 (1897).

In the 54th Congress, a bill was introduced to broaden the uses of a right-of-way under the 1891 Act. As originally drafted, the bill allowed Act of 1891 rights-of-way to be used for "furnishing water for domestic, public and other beneficial uses." The Secretary of the Interior objected that the amendment was too broad. He maintained that the 1891 Act was for public purposes, and that inclusion of the words "other beneficial use" would open the Act to "all sorts of private uses * * *." H. REP. NO. 2790, 54th Cong., 2nd Sess., 3 (1897). Revisions suggested by the Secretary of the Interior were incorporated into the amendment. The reworded amendment, passed by the 55th Congress, 30 Stat. 404, 43 U.S.C. § 951 (1970), says:

* * * [R]ights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act * * * approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature, and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.²

The amendment did not create a new class of grantees; it allowed the right-of-way, once granted for irrigation, "to be used for other pur-

poses named in the section." *Kern River Co. v. United States*, 257 U.S. 147, 152 (1921); *United States v. Portneuf-Marsh Valley Irrigation Co.*, 213 F. 601, 605 (9th Cir. 1914); *Instructions: Applications for Rights-of-Way for Irrigation Purposes*, 39 L.D. 309 (1910); see *Johnson Irrigation Co. v. Ivory*, 24 P.2d 1053, 1056 (Sup. Ct. Wyo. 1933). Is use of a reservoir right-of-way for fish culture or stock-watering permissible under this section? According to the Congress that passed the law, the amendment's purpose was to furnish "water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water supply to many cities and in many of the states and territories, and aid in supplying the same for many other useful purposes." H. REP. NO. 279, 55th Cong., 2d Sess., 1 (1898). The use of a right-of-way for "public purposes," according to the legislative history of the bill, means helping municipalities procure a supply of pure water. Non-irrigating private uses, such as manufacturing, are not permissible uses under the "public purpose" clause of this section, even if they incidentally benefit the general public. *Cf. Smith v. Arkansas Irrigation Co.*, 142 S.W. 2d 509, 511 (Ark. Sup. Ct. 1940); *San Joaquin & Kings River Canal & Irrigation Co. Inc. v. Stevenson*, 164 Cal. 222, 128 P. 924 (1912). The inclusion of private uses was specifically rejected by Congress when it eliminated the "other beneficial use" language

² A further amendment by section 2 of the Act of March 4, 1917, 39 Stat. 1197-98, added "or drainage" to the end of the sentence. That does not change any of the conclusions reached here.

from the 1898 amendment. H. REP. No. 2790, 54th Cong., 2nd Sess. (1897). "Public use" of a right-of-way authorized under the amendment to the 1891 Act therefore, does not include private uses for stock-watering and fish culture.

The amendment also permitted the use of an 1891 right-of-way "for water transportation, for domestic purposes, or for development of power as subsidiary to the main purpose of irrigation." 30 Stat. 404, 43 U.S.C. § 951 (1970). The subsidiary uses are those that aid the goal of irrigation, such as water for the owner of the reservoir, and electrical power to drive pumps to distribute the water. *Instruction: Applications for Rights-of-Way for Irrigation Purposes, supra* at 310. The proposed uses by appellant for fish culture and stock-watering are not authorized uses under the 1891 Act as they are not named, *Kern River Co., v. United States, supra*, nor are they subsidiary.

That a reservoir right-of-way obtained under the 1891 Act does not include exclusive piscatorial privileges in the reservoir and allow the grantee to bar the public from fishing from federal lands covered by the right-of-way is clear. *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357 (8th Cir. 1927).³ Likewise, we see no authorization

for an exclusive stock-watering right based upon an 1891 Act right-of-way. The scope of rights obtained under the 1891 Act have been limited to those expressly authorized by the Act. The limitation in 43 U.S.C. § 949 (1970), as to occupancy of a right-of-way only for the purposes of the Act is applicable to reservoirs as well as ditches and canals which are expressly mentioned. Each provision of the Act is applicable to the entire irrigation project. *United States v. Big Horn Land Cattle Co., supra*. Therefore, we reject appellant's contention that authorization of an 1891 Act right-of-way would include rights for fish culture and stock-watering. If appellant still desires an 1891 Act right-of-way on the basis that the main purpose for the reservoir is irrigation, approval of such a right-of-way would carry only the rights authorized by the 1891 Act and no other. *Id.*

In view of statements made in the appeal it is somewhat unclear as to whether the applicant still has, in effect, applied for a right-of-way under the 1901 Act or whether it has withdrawn its "amendment" of its application to come under that Act, and contemplates, as suggested by its attorney, other applications for additional uses. When this case is returned to the Bureau, appellant should clarify his position with respect to the other uses and file appropriate applications. Such applications should set forth in more detail than has been done in this case the

³ Note the requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq. (1970), where water is impounded under a federal permit or license. See also Board of Commissioners, City and County of Denver, *supra*, and 43 CFR 24.3(b).

extent of the right desired and other information whereby a proper determination may be made. Although the Bureau gave a conditional approval for a 1901 Act right-of-way for all the proposed uses, in the present posture of this case it is premature to decide whether a right-of-way under that Act or some other authority may be granted for the additional uses. It is also, therefore, premature to determine what rentals or other charges should be made for appellant's use of the federal land. It is sufficient to point out that there is no rental requirement for a right-of-way under the 1891 Act, 43 CFR 2802.1-7(c)(2). Charges may be required under appropriate authority, however, for uses of the federal land additional to those authorized by the 1891 Act. *Cf. Utah Power & Light Co. v. United States, supra.*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for appropriate action consistent with this opinion.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

ANNE POINDEXTER LEWIS,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

UNITED MINE WORKERS OF
AMERICA DISTRICT NO. 2,
LOCAL UNION 1520

v.

RUSHTON MINING COMPANY

3 IBMA 217

Decided June 20, 1974

This matter is before the Board on appeal by Rushton Mining Company (Rushton) from a decision of an Administrative Law Judge (Docket No. PITT 73-412), issued on December 7, 1973, sustaining an Application for Compensation filed by United Mine Workers of America, District No. 2 (UMWA) in behalf of certain miners employed by Rushton at its Rushton Mine.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

Immediately upon the issuance of an order of withdrawal, a claim of compensation arises.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Generally

The validity of a section 104(b) order is not in issue in a proceeding under section 110(a) of the Act.

APPEARANCES: Richard M. Sharp, Esq., for appellant, Rushton Mining Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

June 20, 1974

*Factual and Procedural
Background*

This is purely a dispute between the aggrieved miners and the operating company.

The facts necessary to a disposition of this appeal are not in dispute and may be briefly set forth as follows:

As a result of an inspection on September 15, 1970, a section 104(b) Notice of Violation was issued by a Mining Enforcement and Safety Administration (MESA) Inspector. The time for abatement of the condition (which is immaterial on this appeal) was extended for a period of approximately two and one half years. On February 8, 1973, a section 104(b) Order of Withdrawal was issued because the cited violation had not been abated. Thereafter, Rushton filed a timely Application for Review of the Order claiming the condition cited did not constitute a violation of either the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act),¹ or regulations promulgated thereunder.

Subsequent to the filing of the Application for Review, the UMWA filed a timely Application for Compensation in behalf of the miners who were idled as a result of the Order of Withdrawal.

The Application for Review of the validity of the Order of Withdrawal and the Application for

Compensation were consolidated by the Administrative Law Judge (Judge) for hearing and decision.

During the course of the proceedings it was established that as a result of the issuance of the Order of Withdrawal, 29 miners were idled on the 4 p.m. to 12 midnight shift on February 8, 1973. In addition, the UMWA's Exhibit 1, received without objection, established the identities, rates of pay and amount due each individual miner for the idled time. (Tr. 7-12.) Rushton's only defense to the compensation claim was the claimed invalidity of the Order of Withdrawal. (Tr. 11.)

The Judge in his initial decision vacated the 104(b) Notice of Violation and the Order of Withdrawal.² In addition, he sustained the Application for Compensation and ordered Rushton to pay to the individual miners listed in UMWA's Exhibit 1, the amounts shown due as compensation.

Issue Presented on Appeal

Whether an Order of Withdrawal issued pursuant to section 104(b) of the Act but not in compliance with the requirements thereof, and subsequently vacated, will support a claim for compensation pursuant to section 110(a) of the Act.

Discussion

Basically, the contention of Rushton in this appeal is that a *valid* section 104(b) Order of Withdrawal is

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Docket No. PITT 73-383.

a condition precedent to establish a claim for compensation under section 110(a) of the Act.

Recently, this Board in *United Mine Workers of America, District No. 15, Local Union 9856 v. CF&I Steel Corporation*, 3 IBMA 187, 81 L.D. 308, CCH Employment Safety and Health Guide par. 17,962 (1974), held that a claim of compensation arises immediately upon issuance of an order of withdrawal and that the validity of a section 104(a) withdrawal order is not in issue in a proceeding under section 110(a) of the Act. We see no valid reason to differentiate between orders of withdrawal issued pursuant to sections 104(a) or 104(b) of the Act.

No cogent reason has been advanced by Rushton to cause this Board to alter the view we took in *United Mine Workers of America, supra*, and we believe that case is dispositive of the issue raised on this appeal. The miners are idled under either type of order.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Administrative Law Judge IS AFFIRMED.

IT IS FURTHER ORDERED that Rushton Mining Company pay to the miners the compensation as

determined by the Judge to each of the miners listed in his decision on or before thirty days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

3 IBMA 223 Decided June 24, 1974

Appeal by Eastern Associated Coal Corporation from a decision by an Administrative Law Judge dismissing an Application for Review of an imminent danger withdrawal order in Docket No. 73-355.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

The Interior Board of Mine Operations Appeals will affirm the dismissal of an Application for Review of a section 104(a) withdrawal order where the Judge's findings of fact are supported by substantial evidence and the condition cited constitutes an imminent danger.

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and Michael T. Heenan, Esq., Trial At-

June 24, 1974

torney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY
ADMINISTRATIVE JUDGE
DOANE

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Eastern Associated Coal Corporation (Eastern) appeals from a decision in Docket No. HOPE 73-355 dismissing its Application for Review of an imminent danger withdrawal order issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(a), 83 Stat. 751 (1970). The closure order in question cited the following conditions:

In the 2 right longwall section, the roof support jacks were not advanced in proper sequence due to the irregular face and large rocks between the jack line and the conveyor chain line. This exposed the miners to unsafe working conditions in that the plough chain was running against the jack side of the conveyor face line and one man * * * was exposed to unsupported roof while shoveling.

The Judge's decision, which is appended hereto, contains detailed findings of fact, supported by citations to the evidence of record, as well as explicit statements regarding the weight to be accorded to crucial pieces of testimony. We are of the view that the factual determinations made below were based upon substantial evidence and that

Eastern has shown no compelling reason to set them aside.

Having duly considered and rejected Eastern's appellate challenge to the Judge's factual conclusions, it is the judgment of the Board that at the time the closure order was issued, a reasonable man was warranted in concluding that each of the conditions cited constituted a proximate peril to life and limb and that if normal operations designed to extract coal proceeded, a serious accident or disaster could reasonably be expected to occur before abatement. We hold, therefore, that the Judge correctly decided that the operator failed to prove that there was no imminent danger. *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973). See also *Eastern Associated Coal Corporation*, 3 IBMA 208, 81 I.D. 333, CCH Employment Safety and Health Guide par. 18,076 (1974).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision appealed from IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

DECISION

3 IBMA 226

September 6, 1973

I. Introduction

This is a proceeding filed under section 105(a) of the Federal Coal Mine Health and Safety Act by Eastern Associated Coal Corporation to review an order of withdrawal issued by an inspector of the Mining Enforcement and Safety Administration (formerly Bureau of Mines and hereinafter referred to as MESA) under section 104(a) of the Act for imminent danger. A hearing was held on July 17, 1973.

In its application for review the applicant has alleged that the withdrawal order in question is invalid because the conditions and practices described therein did not constitute an imminent danger. Applicant also alleges that the order is invalid because it is based upon a gross misunderstanding of the law and facts by the issuing inspector. In its answer, MESA admits issuance of the order in question and alleges that the facts set forth in the order constituted an imminent danger. The United Mine Workers of America, which under the regulations is a party, also answered alleging that the order was issued as a result of an imminent danger.

The order of withdrawal recites that in the 2 Right longwall section the roof support jacks in No. 2 section were not advanced in proper sequence due to the irregular face and large rocks between the jack line and the conveyor chain line.

The order further states that this condition exposed the miners to unsafe working conditions in that the plough chain was running against the jack side of the conveyor face line and that one man was exposed to unsupported roof while shoveling.

II. Applicable Law

Section 104(a) of the Act provides that if upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

Section 3(j) of the Act provides that imminent danger means the existence of any condition or practice in a coal mine which reasonably could be expected to cause death or serious physical harm before such condition or practice can be abated.

The Board of Mine Operations Appeals has held that the burden of proof in a proceeding for review of an imminent danger order of withdrawal is upon the applicant operator. *Lucas Coal Company*, 1 IBMA 138, 142 79 I.D. 425, CCH Employment Safety and Health Guide par. 15,378 (1972). Proof of violation is

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not necessarily an element of proof of an imminent danger. *Id.* The Board has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from the normal work activity. *Eastern Associated Coal Corp.*, 2 IBMA 128, 136 80 I.D. 400, CCH Employment Safety and Health Guide par. 18,078 (1973).

III. Evidence

Mr. Hansel Robertson, the inspector who issued the withdrawal order and was accepted as an expert on mine health and safety matters (Tr. 92), testified as follows: a longwall section was being actively mined when he arrived on the section (Tr. 6); the longwall face was 430 feet long (Tr. 6, 11); big pieces of rock were present between the conveyor line and the jacks (Tr. 15); a jack setter was working out beyond the canopy which supported the roof, breaking and shoveling the rocks and throwing them into the conveyor lines (Tr. 15, 37, 96); this jack setter was four feet out beyond supported roof (Tr. 15-16); the unsupported roof extended six and a half feet from the edge of the canopy to the face (Tr. 16, 95, 110); he measured the six and a half feet with an extendable ruler which could easily be stuck straight out the six and a half feet (Tr. 16, 111); he did not see

any breaks in the roof (Tr. 16-17); he did not sound the roof because he did not go beyond the roof support (Tr. 17); he told the jack setter to come back under supported roof (Tr. 17); the rocks in front of the jacks were removed behind the jack line (Tr. 98); the jacks were then advanced slowly as the men removed the rocks thereby keeping them under supported roof (Tr. 17, 22-25, 98); in his opinion an unsupported roof could fall at any time (Tr. 24, 29-30); the face of the longwall was hard (Tr. 18); during the prior shift they had encountered a roll (rocks) in the coal and had elected to plough out other sections of the face and leave this area untouched causing a hump in the face of the coal (Tr. 31, 100); because of the hump the plough chain was not running on its normal course but was running next to the back side of the chain conveyor line with a whipping motion toward the jack line (Tr. 18, 39-40, 100-102); this situation could not continue for very long because the conveyor chain would break (Tr. 101, 111-112); the chain moved at 80 to 100 feet per minute (Tr. 115); in his opinion there was a danger of serious injury because the chain which was moving in an area where men normally were required to work, could have hit someone (Tr. 102-105, 116, 117); after his order the face was straightened out and the jacks were moved up (Tr. 115).

Mr. Samuel D. Farmer, the safety supervisor for Eastern Associated Coal Corp. who was accepted as an expert in mine health and safety

matters (Tr. 43), testified as follows: he described in detail the longwall method of mining (Tr. 44 *et seq.*); he did not believe men working between the jack line and the panline would be in imminent danger from a roof fall if they were within four feet of the face (Tr. 65-66); he had seen seams of rock or draw slate come down in pieces in front of jacks (Tr. 68); whether or not a man working beyond the roof supports was in a situation of danger was a matter of judgment for the inspector (Tr. 81-83); he did not know the condition of the face at the time the order of withdrawal was issued (Tr. 73); he did not believe the plough chain could run on the jack side of the conveyor (Tr. 83-84, 86-87).

IV. *Findings and Conclusions*

The order of withdrawal sets forth two conditions or practices which constitute the basis for the inspector's finding of imminent danger. The first condition is the presence of a miner shoveling rock under unsupported roof. The inspector's testimony that the miner was working four feet beyond supported roof was undisputed. The inspector was of the opinion that unsupported roof could fall at any time and therefore he issued the order. This Administrative Law Judge does not find persuasive Mr. Farmer's contrary assertion that a miner could go beyond the roof supports without creating an imminent danger because this assertion was based upon a number of assumptions (*e.g.*, a firm top, no loose brows) which were not

shown to be present in this case (Tr. 75-76). Moreover, Mr. Farmer subsequently acknowledged that the determination that an imminent danger existed with respect to a miner who was working out under unsupported roof would not be an unreasonable conclusion and that it would be a matter of judgment on the part of the inspector (Tr. 81-83). To the extent that Mr. Farmer's opinions differ from those of the inspector, this Administrative Law Judge finds that they are not entitled to as much weight as those of the inspector because Mr. Farmer was not present on the scene when the order of withdrawal was issued. It is recognized that the inspector observed no breaks in the roof. However, the fact that the condition in question could have been more serious and the danger more immediate does not vitiate the inspector's judgment in issuing the subject order under the circumstances as he found them. Also, the fact that the inspector did not sound the unsupported roof does not cast doubt upon his issuance of the order because the inspector could not be expected to go out under unsupported roof. On the basis of the record, therefore, this Administrative Law Judge concludes that the inspector's determination that an imminent danger existed was warranted.

There was testimony from both the inspector and Mr. Farmer that, under the roof control plan, supports were four or five feet apart in mining entries (Tr. 11-12, 65). The record has been carefully reviewed in light of the argument in appli-

June 24, 1974

cant's brief that the condition of the roof in the longwall area in question here is no different than the condition between roof bolts and other permanent supports used in ordinary mining throughout the mine (Applicant's Brief p. 4). It is the opinion of this Administrative Law Judge that the record does not support applicant's allegation in this respect. There is no comparison in the record of what roof supports are necessary and desirable when mining in the entry system as compared with longwall mining. In addition, the record does not show the applicability of the roof control plan to longwall mining. The inspector stated that although the plan permitted four or five feet of unsupported roof in mining entries, the men were protected at all times in that situation because they advanced the roof supports as they went along (Tr. 23). Mr. Farmer stated that there was no specific requirement as to the extent of unsupported roof insofar as longwall mining was concerned (Tr. 65). It has been held, *supra*, that presence of the miner four feet beyond unsupported roof constituted an imminent danger. However, assuming for the sake of argument, that four or five feet of unsupported roof would be permissible in a longwall mining situation, that still would not be a basis for invalidating the subject order of withdrawal. Here the area of unsupported roof was six and a half feet. The presence of the miner four feet beyond supported roof would not be deter-

minative of the existence or nonexistence of imminent danger under such circumstances. What would be determinative would be the fact that there was six and a half feet of unsupported roof and that in shoveling the rock or moving about the miner at any time could have gone out the entire six and a half feet. Accordingly, this Administrative Law Judge concludes that even if the presence of the miner four feet beyond supported roof in and of itself would not constitute an imminent danger, the existence of six and a half feet of unsupported roof with a miner present out in the unsupported area would have constituted an imminent danger sufficient to justify issuance of the order. Since the roof could have fallen at any time the situation could not have been abated before there was a reasonable expectation of death or serious physical injury.

The other condition specified in the order was the operation of the plough chain. In this respect there was a conflict in the evidence. The inspector described in detail the running of the chain and the danger it posed to men who were required to be in the area. He described how the roll in the face and the operator's election to plough around that roll created a hump and caused the chain to operate off its normal course. He also explained the types of injury that could result and stated that he had once seen such an injury. Mr. Farmer, on the other hand, testified that a plough chain could not operate in the manner described. Here again, this Ad-

ministrative Law Judge finds that the testimony of the inspector who personally observed the situation is entitled to more weight than that of Mr. Farmer who was not present. Moreover, much of Mr. Farmer's testimony was based upon a photograph which the inspector testified was different from the conditions which actually existed. Therefore, although Mr. Farmer's testimony regarding principles generally applicable to longwall mining was informative, it is not a sufficient basis for invalidating the order. Since the chain was operating in such a fashion that it could have hit a man at any moment, the order of withdrawal was properly based on this condition.

Additionally, this Administrative Law Judge concludes that normal mining operations could not have proceeded with respect to either of the conditions cited in the order. (*See Eastern Associated Coal Corporation, supra*).

As was held at the hearing, the burden of proof is upon the applicant. This holding is compelled by the Board of Mine Operations Appeals (*see Lucas Coal Company, supra*). This Administrative Law Judge concludes that the applicant has failed to sustain its burden of proof. However, in light of the evidence and testimony presented in this case, the Findings and Conclusions set forth herein would not be any different if the burden of proof had been placed on MESA.

The memoranda and other materials filed by the parties have been

reviewed. To the extent that they are inconsistent with the Findings and Conclusions set forth herein, they are rejected.

V. ORDER

It is hereby ORDERED that the application for review herein be and is hereby DISMISSED.

PAUL MERLIN,
Administrative Law Judge.

APPEAL OF S. A. HEALY COMPANY

IBCA-944-12-71

Decided June 25, 1974

Contract No. 14-06-D-7058, Specifications No. DC 6855, Bonneville Unit, Central Utah Project, Bureau of Reclamation.

Government's Motion to Dismiss Denied.

Rules of Practice: Appeals: Dismissal—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Jurisdiction—Appropriations

The Government's motion to dismiss for lack of jurisdiction a claim asserted under the changes clause of a construction contract was denied where the funding schedule adopted by the contracting agency increased the time required for performance, altered the approved construction program and led to a cessation of work for lack of funds; the contingency provisions of the Funds Available for Earnings Clause were not involved when Congress appropriated funds in the amount deemed necessary and requested by the contracting agency and

June 25, 1974

Congress was not the source of the fund shortage; the Government's assertion that the fund shortage was a breach of contract over which the Board has no jurisdiction was erroneously based on cases wherein Congress had reduced or failed to appropriate the funds requested of it.

APPEARANCES: Mr. A. Barlow Ferguson, Attorney-at-Law, Thelin, Mar-
rin, Johnson & Bridges, San Francisco,
California, for appellant; Mr. John R.
Little, Jr., Department Counsel, Denver,
Colorado, for the Government.

*OPINION BY ADMINISTRATIVE
JUDGE PACKWOOD*

*INTERIOR BOARD OF CON-
TRACT APPEALS*

The Government has moved the Board to dismiss this appeal for lack of jurisdiction, asserting that the claim submitted by the appellant is for breach of contract arising from the alleged failure of the Government properly to handle the funding of the appellant's scheduled earnings under the contract. The appellant has submitted a claim in the amount of \$574,694 for costs alleged to have been incurred when construction stopped because of exhaustion of funds. The appellant contends that the main issue is the contracting officer's refusal to issue a change order, under Clause 3 of the General Conditions, to modify the previously approved construction program so that a subsequent equitable adjustment for increased costs could be granted. The appellant insists that funding is irrele-

vant to the issue except to the extent that the funding which occurred was part of a contractual change directed by the contracting officer.

The contract was awarded on November 18, 1970, in the estimated amount of \$10,971,025 for construction of the Strawberry Aqueduct, Currant and Layout Tunnels, Diversions and Appurtenant Structures, Central Utah Project, under Schedules No. 3C, 3L and 4 of Bureau of Reclamation Specifications No. DC 6855.¹

The Construction Engineer at Duchesne, Utah, the authorized representative of the Contracting Officer, advised the appellant on December 3, 1970, that the sum of \$500,000 had been reserved to cover payments under the contract and cautioned that "prosecution of the work at a rate that will exhaust the funds reserved before the end of the fiscal year will be at your own risk."²

On December 22, 1970, the appellant submitted a construction program for approval pursuant to Paragraph 15, "Construction Program." The construction program set forth scheduled earnings of \$116,000 in fiscal year 1971, \$4,887,000 in fiscal year 1972, \$4,714,000 in fiscal year 1973 and \$1,254,000 in fiscal year 1974. The schedule shows earnings reaching the estimated amount of the contract, \$10,917,025, in December 1973, although the con-

¹ Exhibit No. 1. All references herein to exhibits are to those contained in the appeal file.

² Exhibit No. 2.

tract calls for completion of the construction on September 19, 1974. The appellant's construction program was approved, without comment, by the Construction Engineer on February 22, 1971.³

The next communication in the appeal file is a letter of July 9, 1971, in which the Construction Engineer advised the appellant that an amount of \$1,800,000 for earnings under the contract was included in the budget request submitted to Congress. Prior to passage of the Public Works Appropriation Act, funds were made available under a joint resolution of Congress at the rate provided for in the budget request and reserved for earnings under the contract.⁴

The appellant advised on July 14, 1971, that the funds requested were inadequate and additional funds would be necessary to enable it to proceed in accordance with the construction program.⁵ The appellant also wrote to the Commissioner of Reclamation to inquire if a supplemental appropriation would be requested and, if so, in what amount. The appellant also asserted that its approved construction program was being improved considerably and asked what funds would be requested to provide for the additional acceleration which seemed possible.⁶

The Commissioner responded on August 27, 1971, that prospects of obtaining additional funds by sup-

plemental appropriation were very slight and even if such funds were forthcoming, they would not be available until late spring, which would be of little benefit. The Commissioner asserted that the Bureau of Reclamation had complied with the paragraph on Funds Available for Earnings⁷ and set forth the Bureau's funding schedule for the remainder of the contract. The Commissioner advised that in fiscal year 1971, \$500,000 was reserved and \$345,470 was expended. The amount of \$1,800,000 was in the budget for fiscal year 1972, and over \$3,500,000 was programmed for fiscal years 1973 and 1974, with the balance in fiscal year 1975.⁸

On September 1, 1971, the appellant advised the Construction Engineer that funds for the contract would be exhausted within 30 days and gave notice pursuant to Subparagraph 11e of the need for additional funds to continue the work.⁹

On September 9, 1971, the appellant advised the Construction Engineer that his approval of the construction program calling for \$4,887,000 in earnings in fiscal year 1972 gave no indication of any problem relating to availability of funds

⁷ See Appendix A for text of Paragraph 11 of the contract, "Funds Available for Earnings."

⁸ Exhibit No. 8. The Commissioner did not set forth the balance, which is approximately \$5,171,000, nor did he comment on the feasibility of accomplishing such an amount of work in the 81 days from the beginning of fiscal year 1975 to the contract completion date of September 19, 1974, after the years in which construction was limited to not more than \$1,800,000 per year.

⁹ Exhibit No. 9.

³ Exhibit No. 3.

⁴ Exhibit No. 4.

⁵ Exhibit No. 5.

⁶ Exhibit No. 7.

needed to pursue the schedule. The appellant proceeded to assemble the manpower, equipment and material needed to proceed in accordance with the approved schedule. The appellant asserted that if it had been advised of the Government's intentions with respect to making funds available for the contract, it would have adopted different methods and plans of operations. The appellant took the position that Congress had not failed to appropriate the funds in the budget request and therefore the exculpatory provisions regarding funds available for earnings are inapplicable. Accordingly, the appellant requested a written change order or orders pursuant to Clause 3 of the contract.¹⁰

The Construction Engineer responded on September 24, 1971,¹¹ and disagreed with the appellant's assertion that it was entitled to a change order or orders and that the exculpatory provisions are inapplicable. The Construction Engineer expressed his belief that the handling of funds had been proper and in accordance with Paragraphs 11 and 15.¹² The Construction Engineer reserved an additional sum of \$350,000 for earnings, bringing the total amount reserved to \$2,650,000, but he noted that at the then current rate of progress, the total amount

reserved would be exhausted before October 21, 1971.¹³

On October 9, 1971, the appellant renewed its request for a written change order or orders pursuant to the Changes clause of the contract. Without conceding the applicability of Paragraph 11, appellant advised that it had discontinued working its tunneling machine on September 22, 1971, and it understood that additional time for completion should be measured from that date.¹⁴ The additional reservation of funds in the amount of \$350,000 was utilized for work on Part 1 of the contract which was scheduled for completion on November 1, 1971.¹⁵

The Contracting Officer made a finding of fact on November 17, 1971, allowing a 35-day extension of time for completion of Part 1 but making no finding as to the appellant's request for a change order or orders.¹⁶

By letter of November 24, 1971, the Construction Engineer refused appellant's request of October 14, 1971, for a change order and denied that the Government was responsible for any additional costs during the time the work was stopped because of exhaustion of funds.¹⁷ In a separate letter of the same date, the

¹⁰ Exhibit No. 10.

¹¹ Exhibit No. 11.

¹² Paragraph 11, Funds Available for Earnings, is set forth in Appendix A. Paragraph 15, Construction Program, is set forth in Appendix B.

¹³ The source of the additional funds is not disclosed by the present record. The Public Works Appropriation Bill was enacted into law on October 5, 1971 (P. L. 92-134, 85 Stat. 365).

¹⁴ Exhibit No. 12.

¹⁵ Exhibit No. 13.

¹⁶ Exhibit No. 14.

¹⁷ Exhibit No. 16.

Construction Engineer advised that a supplemental appropriation request providing for an additional \$3,650,000 for the contract had been transmitted to Congress.¹⁸

On December 14, 1971, appellant filed a notice of appeal from the finding of fact of November 17, 1971, as clarified and expanded in the letter of November 24, 1971.¹⁹

On January 6, 1972, an additional sum of \$3,650,000 was reserved to cover payments under the contract.²⁰ Work was resumed on Part 2 of the contract on or about February 27, 1972.²¹

The Government prefaces its argument on the motion to dismiss by asserting that it has been held on many occasions that in the absence of provisions in the contract which provide relief, the Board has no jurisdiction to consider disputes between parties to a Government contract.²² This assertion is correct as

a general proposition, but in the context of the present case, the short assertion calls for an equally short answer: it is the nature of the claim and not the character of the defense that determines jurisdiction. *Pre-Con, Inc.*, IBCA-986-3-73 (September 4, 1973), 73-2 BCA par. 10,227; *Bish Contracting Company, Inc.*, IBCA-951-1-72 (February 12, 1973), 80 I.D. 189, 73-1 BCA par. 9896. The contract contains the standard changes clause under which appellant is claiming entitlement to relief. It is irrelevant to the disposition of the Government's motion whether appellant may be able to sustain its claim when the record is fully developed. In order for the Government to prevail on the motion, it must appear as a certainty on the present record that no relief is available. *Pre-Con, Inc.*, *supra*. No such certainty is evident here.

The Government presents four premises in support of its motion. The first is that Clause 4A of the General Provisions, "Suspensions of Work" is not applicable because the Contracting Officer took no action to suspend, delay or interrupt performance of the work. This premise

IBCA-648-6-67 (August 18, 1969), 76 I.D. 205 69-2 BCA Par. 7838; *Placer County, California*, IBCA-777-5-69 (April 8, 1971), 78 I.D. 113 71-1 BCA Par. 8801; and *Granite Construction Company*, IBCA-947-1-72 (November 13, 1972), 79 I.D. 644 72-2 BCA Par. 9762. In the first four cases, jurisdiction over the appeals was retained pending the results of hearings which produced fully developed records. In *Granite*, the decision turned on actions of the Congress and the President which were undisputed. None of the cited cases provide precedent for dismissing the present appeal where appellant is seeking relief under the changes clause.

¹⁸ Exhibit No. 15.

¹⁹ Exhibit No. 17. In view of the pending request for additional funds, the appellant requested withdrawal of its appeal by letter of December 29, 1971. The appeal was reinstated at the request of appellant on January 5, 1973. Appellant thereafter on August 2, 1973, submitted details of its claim for \$564,694 (Exhibit No. 23). The Contracting Officer found that appellant had, in fact, expended funds during the suspension of work but denied the claim on the basis of his finding that the cessation of work because of exhaustion of funds was neither a constructive change nor a constructive suspension of work (Exhibit No. 24).

²⁰ Exhibit No. 19.

²¹ Page 8, Government's Brief in Support of Motion to Dismiss.

²² The Government cites five cases in support of this proposition: *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966); *American Cement Corporation*, IBCA-496-5-65 and 578-7-66 (September 21, 1966), 73 I.D. 266 66-2 BCA Par. 5849; on reconsideration, 66-2 BCA Par. 6065 (January 10, 1967) 74 I.D. 15; *MevA Corporation*,

and the Government's argument in support of it are largely misdirected for the reason that appellant is not seeking relief under the suspension of work clause. From the inception of its claim appellant has sought relief only under the changes clause.²³

The Government's first premise serves mainly as a vehicle for an extended discussion of the Board's decision in *Granite Construction Company*, IBCA-947-1-72 (November 13, 1972), 79 I.D. 644, 72-2 BCA par. 9762, in which we dismissed a claim under the suspension of work clause where a shortage of funds caused a cessation of work. By asserting that the circumstances here are comparable to those in *Granite*, the Government ignores the fact that the shortage of funds in *Granite* arose outside the contracting agency while the record here indicates nothing more than a fund shortage resulting from the contracting agency's own decisions in administering the contract. In *Granite* there was delay by Congress in appropriating funds and then an impounding of a portion of the funds by the President. The Board found that the inaction of Congress could not be regarded as an act of the Contracting Officer and the Presidential impounding was an exercise of sovereign power to which immunity attached. Neither circumstance is present here.

²³ The Government acknowledges, on page 5 of its brief, that the appellant's claim under the changes clause was first set forth in the letter of September 9, 1971 (Exhibit 10), and that the appellant continues to assert the same claim.

Congress appropriated funds in the amount contained in the budget request and made them available without delay under a joint resolution prior to enactment of the appropriation. There was no impounding of funds and hence the shield of sovereign immunity is not available.

In *Granite*, the Board stated, with respect to the paragraph entitled "Funds Available for Earnings," that "a clause of this significance may be ignored by a contractor only at its peril." In the present case we must add that the provisions of the clause may be ignored by the Government only at its peril. The clause provides that "* * * the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress * * *." ²⁴ If the Bureau of Reclamation determined what appropriation was necessary, placed that amount in the budget request and Congress appropriated the sum requested, the contracting agency can point to no one but itself as the source of the shortage of funds. The contingency provision is not invoked.

After arguing that the suspension of work clause does not apply, the Government contends that there is no material difference between assertion of rights under the suspension of work clause and a claim under the changes clause. It is the Government's position that the

²⁴ The full text of Paragraph 11, "Funds Available for Earnings" appears in Appendix A, *infra*.

changes clause is not applicable because the Government did not make any changes within the meaning of the clause, and it asserts that the keystone of the entire matter is the lack of action by the Contracting Officer.

Inaction by the Contracting Officer is not a substantial keystone to support the Government's arch of logic since actions by the contracting agency are attributable to the Contracting Officer.²⁵ The appeal file indicates that the contracting agency adopted the funding schedule set forth in the commissioner's letter of August 27, 1971. Although it would appear, in the absence of further explanation, that the funding schedule deviated from the approved construction program to the extent that a constructive change occurred, it is unnecessary to reach the question of the consequences of such action as it relates to the construction program. For the purpose of disposing of the Government's motion, it is necessary only to observe that the funding schedule changed the contract itself by leaving approximately \$5,171,000 worth of construction to be completed in fiscal year 1975, while the contract called for completion of the work on September 19, 1974. After three fiscal years in which the amount of construction was limited to not more than \$1,800,000 per year by the funding schedule, it does not appear feasible to expect completion of

the project in the 81 days from the beginning of the fiscal year to the specified completion date. The effect, therefore, can easily be construed as a change increasing the time required for performance within the meaning of paragraph d of the changes clause.²⁶ The impact on ap-

²⁶ "a. Clause No. 3.—Clause No. 3, entitled 'Changes,' is deleted from Standard Form 23-A and the following clause is substituted therefor:

"3. CHANGES

"(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

"(i) in the specifications (including drawings and designs);

"(ii) in the method or manner of performance of the work;

"(iii) in the Government-furnished facilities, equipment materials, services, or site; or

"(iv) directing acceleration in the performance of the work.

"(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

"(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

"(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: Provided, however, That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required; And provided further, That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Con-

²⁵ *Philco-Ford Corporation*, ASBCA No. 14623 (March 28, 1972), 72-1 BCA par. 9390. See also *Beuttas v. United States*, 111 Ct. Cl. 532 (1948).

June 25, 1974

pellant's cost cannot be determined from the present record. Appellant is entitled to prove, if it can, that its costs were increased thereby.²⁷

The Government's third premise is that appellant's remedy, if any, is for breach of contract, citing *Winston Bros. et al. v. United States*, 131 Ct. Cl. 245, 130 F. Supp. 374 (1955), and *Northern Helex Co. v. United States*, 197 Ct. Cl. 118, 455 F.2d 546 (1972). Both of those cases, however, involve the failure of Congress to appropriate funds requested of it. Neither case offers a useful precedent for the present case in which Congress appropriated the funds requested and made them available without delay.

The appellant may have chosen to assert its claim under the contract lest it find itself in the Court of Claims with the Government de-

fending on the basis that the administrative remedies were not exhausted.

The Government's final premise is that the exhaustion of funds was a predicament of appellant's own making. We find it difficult to characterize appellant's actions as unilateral in view of the Construction Engineer's approval of the construction program and his apparent silence while appellant mobilized its forces to comply with the approved program. On the other hand, the present record does not show what action, if any, appellant took to scale down its operations to conform to the funds available for fiscal year 1972 when it was informed that funds would not be furnished in accordance with the construction program. Determination of the impact of the funding situation on appellant's costs and the further determination of the responsibility for those costs depend on findings of fact which cannot be made on the basis of the present incomplete record.

Decision

The Government's motion to dismiss is denied. Within 30 days from the date of receipt hereof, the parties shall advise the Board in writing as to a mutually acceptable location and time for the hearing in this matter, or in the absence of an agreement being reached, their preferences respecting the location and time of hearing, supported by

tractor in attempting to comply with such defective specifications.

"(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

"(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

²⁷ The fact that funds were subsequently provided in a different manner than the funding schedule specified does not establish that the Bureau of Reclamation did not intend to follow that schedule at the time the Commissioner disclosed it to appellant. The Commissioner had to be taken at his word and appellant was entitled to adjust its construction program in accordance with the Commissioner's statements.

such information as they desire the Board to consider, together with an estimate by each counsel of the time required to present his case-in-chief.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPENDIX A

11. FUNDS AVAILABLE FOR EARNINGS

Pursuant to section 12 of the Reclamation Project Act of 1939 (43 U.S.C. sec. 388), funds for earnings under this contract will be made available as provided in this paragraph.

a. Under the contract to be entered into under these specifications, the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder. Further, the Government shall not be liable for damages under this contract on account of delays in payments due to lack of funds.

b. Funds for payment of earnings under this contract are included in the budget for fiscal year 1971 which is now before the Congress and it is anticipated that they will be included in the Appropriation Act for fiscal year 1971. Prior to the effective date of the Appropriation Act, Payment for earnings may be made from such funds as may be available by appropriations for interim periods by Congress within which such limitations as may be imposed by Congress. The contractor will be advised of funds which

are thus available. After the Appropriation Act is effective, the contractor will be notified of the sums, if any, reserved and available for payments under this contract for the fiscal year 1971. During the period between the end of fiscal year 1970 and the effective date of the Appropriation Act for fiscal year 1971, the provisions of Subparagraph e. regarding the giving of notices by the contractor and the Government as to exhaustion of funds shall not apply.

c. If at any time the contracting officer finds that the balance of reserved funds is in excess of the estimated amount required to meet all payments due and to become due the contractor because of work performed or to be performed prior to July 1, 1971, the right is reserved to reduce said reservation by the amount of such excess. The contractor will be notified in writing of any such reduction.

d. If the rate of progress of the work is such that the contracting officer finds that the balance of reserved funds is less than the estimated amount required to meet all payments due and to become due because of work performed prior to July 1, 1971, the Government may reserve additional funds for payments under this contract if there are funds available for such purpose. The contractor will be notified in writing of such additional reservation.

e. Should it become apparent to the contractor that existing fund reservations will be exhausted within the next 30 days, the contractor shall at that time give written notice thereof to the contracting officer. If additional funds can be made available, the contracting officer may issue an additional fund reservation as provided for in Subparagraph d. hereof. It is expressly understood, however, that the Government has no obligation to provide funds in addition to those reserved in writing. The contractor is also cautioned that the prosecution of the work at the end of the fiscal year will be at his own risk. If additional funds cannot be made available, the contracting

June 25, 1974

officer will give written notice thereof to the contractor. If at any time funds are being made available by appropriations for interim periods prior to the enactment of an Appropriation Act, the contractor will be so advised in writing in which case the other notice requirements of this subparagraph will not apply.

If the contractor so elects, he may continue work under the conditions and restrictions of the specifications after funds have been exhausted, so long as there are funds for inspection and supervision, concerning which he will be notified in writing. No payment will be made for any work done after funds have been exhausted unless and until sufficient additional funds have been provided by the Congress. When funds again become available, the contractor will be notified in writing as to the amount thereof reserved for payments under this contract. The amount so reserved shall be subject to decrease or increase in a manner similar to that provided in Subparagraphs c. and d. hereof. However, if the contractor so elects, the work may be suspended when the available funds have been exhausted. Should work be thus suspended, additional time for completion will be allowed equal to the period during which the work is necessarily so suspended.

f. The procedure above described in this paragraph shall be repeated as often as necessary on account of exhaustion of available funds and the necessity of awaiting the appropriation of additional funds by Congress.

g. Should Congress fail to provide the expected additional funds during its regular session, the contract may, at the option of the contractor, by written notice, be terminated and considered to be completed without prejudice to him or liability to the Government at any time subsequent to 30 days after payments are discontinued, or subsequent to 30 days after passage of the Act which would ordinarily carry an appropriation for continuing the work, or after adjournment of the Congress which failed to make the necessary appropriations.

APPENDIX B

15. CONSTRUCTION PROGRAM

Within forty-five (45) calendar days after date of receipt of notice of award of contract, the contractor shall submit to the authorized representative of the contracting officer for approval a complete and practicable construction program. The construction program shall show in detail his proposed program of operations and shall provide for orderly performance of the work. Pending approval of his program the contractor shall proceed with the work in accordance with these specifications and his proposed construction program.

The construction program shall be in such form and detail as to show the following:

- a. Sequence of operations.
- b. The dates for commencing and completing the work on the several controlling features of the project. (Including erection of construction plant and each item or group of like items involving placement of concrete, if applicable.)
- c. The dates of issuance of orders for procurement of contractor-furnished materials and equipment and their delivery and installation dates.
- d. The dates on which contractor-prepared drawings will be submitted for approval (including all shop drawings as required in these specifications).

The construction program shall be in suitable form and show the percentage of work for each line item scheduled for completion each month, and shall include the contractor's estimate of earnings by months. The contractor's estimate of

earnings by months shall not obligate the Government to provide funds in any manner other than as provided in the paragraph of these specifications entitled "Funds Available for Earnings."

An original or translucent reproducible and three blackline prints of each construction program and each revised program shall be submitted. Originals or reproducibles shall be of such quality as to permit clear, sharp, legible prints to be made by direct-contact methods.

The contractor shall enter on the program the actual progress at the end of each progress payment period or at such other intervals as directed by the contracting officer, and shall submit two such marked prints of the program to the contracting officer's authorized representative.

Timely submittal of the construction program and timely revisions thereto are important. The Government must have the information contained in the construction program for such purposes as scheduling the preparation of additional drawings required for construction purposes, delivery of Government-furnished materials and equipment, scheduling services of inspectors and survey crews. Accordingly, the contractor will be assessed as fixed, agreed and liquidated damages the sum of twenty dollars (\$20) per day for each calendar day's delay the contractor's original construction program is late. Further, should the contracting officer notify the contractor in writing that a revision of the construction program is required

then liquidated damages in the amount of twenty dollars (\$20) per day will be assessed for each calendar day beyond thirty (30) calendar days, after receipt of such notification, that the contractor fails to submit the required revision.

If the contractor elects to program the work by the Critical Path Method (CPM), or by a similar type of net work analysis system, he shall submit such program in lieu of the program specified above including information required above. The contractor shall submit translucent reproducibles of the network diagram and of print-out or computation sheets for such construction program. Reproducibles shall be of such quality as to permit clear, sharp, legible prints to be made by direct-contact methods. If requested, the contractor shall also furnish a printout of the computer data.

HAROLD & IRENE KYLLONEN

16 IBLA 86

Decided June 26, 1974

Appeal from decision of the Montana State Office, Bureau of Land Management, allowing application for renewal of small tract lease (Montana 01344) subject to payment of increased rental and execution of stipulations.

Affirmed.

Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence—Small Tract Act: Appraisals

June 26, 1974

Where an applicant for a small tract lease contends that the rental set by the Bureau of Land Management appraisal is excessive, the burden is upon applicant to prove by substantial and positive evidence that the appraisal is in error.

Small Tract Act: Renewal of Lease

The filing of an application to lease under the Small Tract Act does not vest any legal right or interest in the applicant, for it is within the discretion of the Secretary whether or not to exercise his authority to lease the land.

Small Tract Act: Renewal of Lease

Where the Bureau of Land Management properly determines that land which had been embraced by a small tract lease is well located and ideally suited for public use as a recreational area, it may limit the lease to a nonrenewable five-year term.

Small Tract Act: Classification—Small Tract Act: Sales

Before land classified for lease may be sold under the Small Tract Act, it is necessary that the land be classified for sale in compliance with the provisions of 43 CFR Part 2400.

APPEARANCES: Harold and Irene Kyllonen, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Harold and Irene Kyllonen of Butte, Montana, have appealed from the decision of the Montana State Office, Bureau of Land Management, dated October 1, 1973, allowing an application for renewal of a lease filed pursuant to the Small

Tract Act, *as amended*, 43 U.S.C. §§ 682(a)–682(e) (1970), subject to payment of rental increased to \$195 per year and execution of special stipulations. Appellants contend the rent is too high and they oppose inclusion of the stipulation that the lease is not renewable after the five-year period beginning April 1, 1973. They also reiterate their interest in purchasing the property.

The tract in question contains 2.5 acres and is situated in Beaverhead County, Montana, approximately seven miles northwest of Wise River, Montana. The land is accessible from State Highway #43, by $\frac{1}{8}$ mile of fair gravel road. The land has been classified for lease only under the Small Tract Act, *supra*, and 43 CFR 2731.2.

Mrs. Lillian Thomas, who had formerly leased the tract, requested that the lease be assigned to appellants who were purchasing her cabin. The Bureau approved the assignment on September 27, 1961. The expiration of the date of the lease was March 31, 1966. Appellants applied for a renewal of their lease which the Bureau approved for a seven-year period. Appellants made several attempts to purchase the land but the Bureau informed them that the tract in question had been classified for lease only. On March 2, 1973, appellants filed formal application for renewal of their lease.

In its field examination report of February 14, 1973, the Bureau noted the topography of the site, stating that the eastern half is situated on

the bottom land along Tie Creek, while the western half is situated on a very steep valley slide. The entire tract has a good cover of lodgepole pine and douglas fir trees on it. The economy of the area is based on livestock ranching, with some tourism, mining, and timber production.

Considering the need of the tract for recreational purposes, the Bureau recommended the lease be issued for a nonrenewable term of five years. Such a period was designed to allow appellants time to remove their present improvements on the tract.

In its environmental analysis of the area the Bureau noted that the tract is part of a large block of National Resource land containing approximately 2,160 acres, located along the northern end of the Pioneer mountain range. The area is anesthetically pleasing. Because of proximity to Butte, Anaconda, and Dillon, there is considerable recreational use of the area—fishing, hunting,¹ skiing, and year-round homesites. In the near future, Highway #15 will be completed which will pass 20 miles to the east, linking Butte and Dillon. A better highway will increase the recreational use and create further

demands for camp sites along this stretch of the Big Hole River.

In its appraisal dated August 27, 1973, the Bureau compared the property with five sales in the area. Due to the high demand for recreational property, land values have increased rapidly particularly during the past few years, and a 300 percent increase between 1963 and 1970 is typical for the area.

Appellants contend that the rent is too high for land that is used only as a recreational cabin site, covered with snow for five months of the year and located on the north side of a large hill without enough sunshine for crops. They state that the rent has been raised from \$10 a year in 1961 to \$35 a year in 1968 and finally to \$195 a year in 1972. Mr. Kyllonen is paralyzed and confined to a wheel chair. He explains that he is living on a fixed income and if the rent is raised, he will not be able to afford it.

We find that the rental of the land set by the Bureau properly reflects a reasonable estimate of the value of the property. In their statement of reasons, appellants do not contest any specific part of the appraisal report, nor do they show that the report failed to meet the Bureau's standards. If an applicant contends that the rental is erroneous, the burden is upon him to prove by substantial and positive evidence that the appraisal is in error. *See Nick Lambros*, 10 IBLA 135 (1973). Appellants have not met this burden. While the rental has

¹A 1967 appraisal noted: "There is excellent big game hunting in this neighborhood with some very good trout fishing on the streams. The Big Hole River which runs through this neighborhood is a nationally known Blue Ribbon trout stream. Recreation and tourism contribute a great deal to the economy of this neighborhood."

been substantially increased, we do not find it excessive compared to the estimated \$2,500 value of the land.

Appellants urge that the land is of no use for anything else and they should be allowed to renew the lease every five years. It should be clear at the outset that appellants are not entitled as a matter of right to the land for which they have applied. It is within the discretion of the Secretary whether or not to exercise his authority to lease under the Act. 43 U.S.C. § 682(a). The filing of a small tract application to lease in compliance with the regulations of the Department does not vest in the applicant any legal right or interest in the land described by the application other than a right to have the application considered. *Ralph S. Hoerning*, 10 IBLA 203 (1973).

We cannot agree with appellant's contention that the land is not valuable for recreation purposes. Departmental regulation 43 CFR 2730.0-2(a) states that the purpose of the Small Tract Act is

* * * to promote the beneficial utilization of the public lands subject to the terms thereof, and at the same time to safeguard the public interest in the lands * * *. [S]mall tract sites will be considered in the light of their effect upon the conservation of natural resources and upon the communities or area involved * * *. Lands will not be leased or sold, for example, which would lead to private ownership or control of scenic attractions, or water resources, or other areas that should be kept open to public use. * * *

The Bureau's field report demonstrates that the tract is well located

and ideally suited for public use. The Bureau has determined that there is a growing need for camping facilities in the area and that this site is located on a suitable flat. That has not been controverted by appellants.

In view of the recreational potential of the tract, the Bureau's determination is not unreasonable or arbitrary and will not be disturbed. *Ralph S. Hoerning*, *supra*. The other arguments advanced by the appellants have been examined but do not warrant reversal of the Bureau's decision. As to appellants' statement that they desire to purchase the land, before land classified for lease can be sold it must be classified for sale² in compliance with the provisions of 43 CFR Part 2450.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

ANNE POINDEXTER LEWIS,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

² Because of the Bureau's program of recreational development in the area, it is questionable whether the land would be reclassified for sale.

**UNITED MINE WORKERS OF
AMERICA, DISTRICT NO. 2,
LOCAL UNION 1520**

v.

RUSHTON MINING COMPANY

3 IBMA 231

Decided *June 27, 1974*

This matter is before the Board on appeal by United Mine Workers of America, District No. 2 (UMWA) from a decision of an Administrative Law Judge (Docket No. PITT 73-224) issued on February 20, 1974, denying an Application for Compensation filed by UMWA in behalf of certain miners employed by Rushton Mining Company (Rushton) at its Rushton Mine.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

Immediately upon the issuance of an order of withdrawal a claim of compensation arises.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Generally

The validity of a section 104(b) withdrawal order is not a consideration in a proceeding under section 110(a) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation

While idled miners may be entitled to compensation under section 110(a) of the Act they are not entitled to interest on such compensation or for costs sustained.

APPEARANCES: M. Lawrence Shields, III, Esq., and J. Davitt McAteer, Esq., for appellant, United Mine Workers of America, Local Union 1520, District 2; John R. Carfley, Esq., for appellee, Rushton Mining Company.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
ROGERS*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

*Factual and Procedural
Background*

The operative facts necessary to a disposition of this appeal are not in dispute and may briefly set forth as follows:

As a result of an inspection on September 6, 1972, a section 104(b) Notice of Violation was issued by a Mining Enforcement and Safety Administration (MESA) Inspector pursuant to the Federal Coal Mine Health and Safety Act of 1969 (Act).¹ The condition (which is immaterial on this appeal) was to be abated on September 8, 1972. An inspection on that date revealed that the cited violation was not abated. The Inspector then issued an Order of Withdrawal. Rushton Mining Company (Rushton) appealed this Order of Withdrawal to the subdistrict office of the Bureau of Mines (now MESA). On September 11,

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

June 27, 1974

1972, as a result of that appeal, two Federal coal mine inspectors investigated the matter. On September 13, 1972, the section 104(b) Order was vacated by MESA for the stated reason that it was issued in error.

On October 24, 1972, the United Mine Workers of America (UMWA) filed a timely Applica-

tion for Compensation on behalf of 8 miners who were idled on the 4 p.m. to 12 midnight shift on September 8, 1972, as a result of the issuance of the Order of Withdrawal. The names, job assignments, and amount of compensation applicable to a four (4) hour period for each of the idled miners are as follows:

JOHN HURTACK-----	LOADER OPERATOR-----	\$20. 53
JOSEPH REPASKY-----	LOADER HELPER-----	20. 53
JOHN KOPCHAK-----	CUTTER-----	20. 53
WILLIAM SOUTHARD-----	DRILLER-----	19. 78
GEORGE BAINEY-----	RAM CAR OPERATOR-----	19. 13
RAY CONKLIN-----	RAM CAR OPERATOR-----	19. 13
ANAY POLLOCK-----	ROOF BOLTER-----	20. 53
JOSEPH POHULLA-----	SHOT FIRER-----	19. 76

The Administrative Law Judge (Judge) in his initial decision denied the Application for Compensation for the reason that the Order which idled the miners was invalidly issued and subsequently vacated by MESA.

Issue Presented on Appeal

Whether an order of withdrawal issued pursuant to section 104(b) of the Act but subsequently vacated as not in compliance with the requirements thereof, will support a claim for compensation pursuant to section 110(a) of the Act.

Discussion

Recently, in *United Mine Workers of America, District No. 15, Local Union 9856 v. CF&I Steel Corporation*, 3 IBMA 187, 81 I.D. 308, CCH Employment Safety and

Health Guide par. 17,962 (1974), we held that a claim of compensation arises immediately upon the issuance of an Order of Withdrawal² and that the validity of a section 104(a) withdrawal order is not a consideration in a proceeding for compensation under section 110(a) of the Act.

In accord with our holding in *United Mine Workers of America, supra*, we reverse the Judge's decision and hold that the idled miners are entitled to be compensated for four (4) hours at their regular rate of pay.

Also, recently we held in *United Mine Workers of America, District No. 2, Local Union 1520 v. Rushton Mining Company*, 3 IBMA 217 (IBMA 74-50), 81 I.D. 346, CCH

² *United Mine Workers of America, District No. 31 v. Clinchfield Coal Company*, 1 IBMA 31, 78 I.D. 153, CCH Employment Safety and Health Guide par. 15,367a (1971).

Employment Safety and Health Guide par. 18,077 (1974) that we could perceive no reason to differentiate between orders of withdrawal issued pursuant to sections 104(a) or 104(b) of the Act insofar as claims for compensation are concerned.

In addition to claiming the compensation for the idled miners, UMW A seeks further relief in the form of "interest calculated at 6% per annum and costs sustained." No authority has been cited to us for granting such relief; section 110(a) of the Act does not provide for such relief in compensation cases, and we are not cognizant of any other authority to support such a claim. We, therefore, must reject this claim.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the order of the Administrative Law Judge in his initial decision of February 20, 1974, is reversed and set aside.

IT IS FURTHER ORDERED that Ruston Mining Company pay to the eight named miners listed in this decision the compensation as set forth herein on or before thirty days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

UNITED STATES v. FRANK W. WINEGAR ET AL.

16 IBLA 112

Decided June 28, 1974

Appeal from a decision of Administrative Law Judge Dent D. Dalby, holding that five and a portion of a sixth oil shale placer mining claims are valid and can proceed to patent. (Colorado Contests 359, 360.)

Reversed.

Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

To satisfy the requirement of discovery of a valuable mineral deposit within the boundaries of an oil shale placer claim located prior to February 25, 1920, it must appear that at that time the mineral deposit could have been developed, extracted, and marketed at a reasonable profit; it must also appear that such marketability has continued without substantial interruption from that time to the time of the contest proceedings. Where it has been shown that at no time would a prudent man have expended further labor or means in order to develop actual mining operations, discovery of a valuable mineral deposit has not been made, and the claims must be declared null and void.

Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

In order for an oil shale deposit to be considered valuable within the meaning of the general mining law, it must appear as a present fact, as of February 25, 1920, and at all times thereafter that the deposit could be developed, extracted, and

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marketed at a reasonable profit. The possibility of dramatic technological breakthroughs or changes in market conditions at some future date has no bearing on value as a present fact.

Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Rules of Practice: Evidence

What men have or have not done over a period of years is proper evidence as to the conduct of a prudent man in the same or very nearly the same circumstances. Where oil shale claims had been held for fifty years and no commercial production was achieved on such claims, it must be concluded that no prudent man would have been justified in the belief that the mineral deposit could be developed, extracted, and marketed at a reasonable profit.

Rules of Practice: Generally

Departmental precedent will be overruled where it is shown: 1) that it is contrary to the law as interpreted by the courts and this Department; and 2) it would result in the disposition of public lands to those not entitled to receive them.

FREEMAN v. SUMMERS, 52 L.D. 201 (1927), is overruled.

APPEARANCES: Albert V. Witham, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for appellant; Tweedy & Mosley, Denver, Colorado, and Clearly, Gottlieb, Steen & Hamilton, New York, New York, attorneys for appellees, Frank W. Winegar and Shell Oil Co.; Senior and Senior, Salt Lake City, Utah, attorneys for appellee, D. A. Shale, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

INTERIOR BOARD OF LAND APPEALS

The United States appeals from that part of the decision by Administrative Law Judge (formerly Hearing Examiner) Dent D. Dalby dated April 17, 1970, validating placer mining claims Mountain Boy Nos. 6 and 7, and Harold Shoup Nos. 1, 2, 3 and 4.¹ The basic issue presented in this appeal is whether the oil shale on the subject claims was a valuable mineral deposit as of February 25, 1920, when oil shale was withdrawn from location under the general mining law by the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), 30 U.S.C. § 181 *et seq.* (1970), and, if so, whether such oil shale has continued to be a valuable mineral deposit within the meaning of the general mining law, 30 U.S.C. § 22 *et seq.* (1970).²

The Mountain Boy Nos. 6 and 7 were surveyed in 1917 in 160 acre

¹ There were nine claims involved in the proceedings below: the Mountain Boy Nos. 1, 6, and 7, the K.C. Schuyler Nos. 2 and 3, and the Harold Shoup Nos. 1, 2, 3, and 4. The Mountain Boy No. 1, and the K. C. Schuyler Nos. 2 and 3 were declared invalid by Judge Dalby for lack of a physical finding of oil shale on the claims prior to February 25, 1920. Additionally, Judge Dalby found that 35.4 acres of the Harold Shoup No. 3 were non-mineral in character. That portion of the decision is final since no appeal was taken as to those claims.

² Section 37 of the Act (41 Stat. 451), 30 U.S.C. § 193, also excepted claims on which a discovery had not been made by February 25, 1920, but on which work leading to a discovery was being diligently prosecuted on that date and was thereafter continued to a discovery. See *Starks v. Mackey*, 60 L.D. 309, 310 (1949). No party asserts that the claims in issue fall within this exception. Therefore, this exception will not be restated in further discussion below.

legal subdivisions. The location certificates were recorded February 6, 1918, showing location on January 8, 1918, by the same eight locators for both of the claims. Between 1917 and the early 1950's ownership of the claims changed several times. In 1956 Frank Winegar made an agreement with Shell Oil Company that he would attempt to purchase the Mountain Boy claims and use due diligence to obtain patents thereto for Shell. Shell agreed to buy the claims after patenting for \$60 per acre and to reimburse Winegar's expenses up to \$12,800. Winegar obtained title to a number of Mountain Boy claims, including Nos. 6 and 7. On August 7, 1958, he filed a patent application with the Bureau of Land Management for Mountain Boy Nos. 1-8. In a report of December 14, 1959, a Bureau evaluation engineer recommended that patents be issued for the Mountain Boy Nos. 1, 6 and 7. A final certificate was issued by the Bureau of Land Management on November 30, 1960, for such claims. On March 21, 1961, the final certificate was approved for patent by a Minerals Adjudicator of the Bureau. The application was sent to the Director of the Bureau of Land Management for issuance of patent. A patent was not issued. Instead, some three and one-half years later, Colorado Contest 359 was initiated. Subsequently, Shell purchased the Mountain Boy Nos. 1, 6 and 7 from Winegar in November 1964 for \$30,000.

The Harold Shoup Nos. 1, 2, 3 and 4 were located on September 29,

1917, by eight co-locators. The location certificates were recorded by October 27, 1917. S. D. Crump acquired such claims and quitclaimed them to Karl C. Schuyler, Sr., on May 24, 1923. When Schuyler died testate on July 31, 1933, the claims passed to his wife. On July 6, 1960, she incorporated D. A. Shale, Inc., under the laws of the State of Colorado, and transferred possessory title of the claims to such corporation. On September 29, 1960, the corporation filed an application for patent of these and other claims.

The instant case arose on September 8, 1964, when the Manager, Colorado Land Office, Bureau of Land Management, issued two complaints on behalf of the United States alleging the invalidity, *inter alia*, of the claims herein and requesting that they be declared null and void. Both complaints charged that:

A. Valuable minerals were not found within the limits of the Claims on or before February 25, 1920, or subsequent to February 25, 1920, as a result of diligent prosecution of work leading to a discovery on February 25, 1920, and thereafter continued, so as to constitute a valid discovery within the meaning of the mining law.

B. If a valid discovery was made on or before February 25, 1920, or subsequent to February 25, 1920, as a result of diligent prosecution of work leading to a discovery on February 25, 1920, and thereafter continued, the discovery was subsequently lost and the lands within the claims reverted to and became a part of the vacant unappropriated public domain.

C. Valuable minerals do not now exist within the limits of the claims so as to

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constitute a valid discovery within the meaning of the mining law.

On October 7, 1964, contestee D. A. Shale, Inc., filed an answer to the complaint denying the allegations. On November 9, 1964, contestee Frank W. Winegar, having obtained an extension of time in which to respond, filed an answer similarly controverting the allegations. At the same time Shell Oil Company filed a motion to intervene, alleging that it had purchased the Mountain Boy claims from Winegar. This motion was granted on November 9, 1964.

On March 9, 1967, leave was granted to the contestees to amend their answers to the complaints. The two cases were joined for hearing and decision. The hearing on the complaints was commenced on June 20, 1967, at Denver, Colorado, and continued until October 13, 1967. A further hearing was held on November 20, 1967, at Salt Lake City, Utah.

After these adjudicatory proceedings Judge Dalby made an extensive review of the applicable mining law with respect to the evidence presented in the proceedings and concluded:

If this were a case of first impression I would, for the foregoing reasons, find that * * * oil shale was not a valuable mineral deposit. (Dec. at 55.)

However, because of prior departmental precedent, particularly *Freeman v. Summers*, 52 L.D. 201 (1927), Judge Dalby felt that he was precluded from entering such a finding; accordingly he held that

five claims and a portion of a sixth were valid.

Appellant contends that there is no basis in fact or law for that holding and that prior departmental precedent with respect to oil shale is in error and should be overruled. Appellees argue that prior departmental precedent is a correct statement of both fact and law, but even if that precedent is to be overruled, such action may only be given prospective effect.

I. The Mining Law

The general mining law provides in pertinent part that

* * * all *valuable* mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase * * *. (Italics added.)

Act of May 10, 1872, *as amended*, 30 U.S.C. § 22 (1970).

From 1872 to 1920 oil shale was locatable under the general mining law. However, the Mineral Leasing Act of February 25, 1920, withdrew oil shale from disposition under the mining law, except as provided in section 37 thereof, 30 U.S.C. § 193 (1970).

Since enactment of the general mining law, the courts and the Department of the Interior have consistently held that a valuable mineral deposit has been discovered where there have been found within the limits of a claim minerals of such quantity and quality that a prudent man would be justified in the expenditure of his labor and means with a reasonable prospect of

success in developing a valuable mine. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Cameron v. United States*, 252 U.S. 450, 460 (1920); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 675 (1888); *United States v. Zweifel*, 11 IBLA 53, 80 I.D. 323, 328-29 (1973); *Oregon Basin Oil and Gas Co. (On Rehearing)*, 50 L.D. 253, 254 (1924); *Castle v. Womble*, 19 L.D. 455, 457 (1894).

Although both appellant and appellees agree with that general statement of the law, appellant contends that the facts of this case mandate the conclusion that oil shale is not now and was not in 1920 a valuable mineral deposit, while appellees assert the opposite.

The clear purpose of the law has always been to obtain the development of actual mining operations. Several years after enactment of the general mining law the Supreme Court stated:

* * * It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose * * *.

United States v. Iron Silver Mining Co., 128 U.S. 673, 675 (1888).

Eighty years later the Court adhered to the same view:

* * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. * * *

United States v. Coleman, 390 U.S. 599, 602 (1968).

Decisions of this Department are in accord with that reasoning. We

have stated several times that actual mining operations are the best evidence that a mineral deposit is valuable. See, e.g., *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 304; 80 I.D. 538, 549 (1973); *United States v. McKenzie*, 4 IBLA 97, 100 (1971). It is where actual mining operations have not been initiated that the difficulty arises in determining whether a mineral deposit is valuable. While proof of actual sales of minerals from a claim is not an indispensable element in establishing their marketability, lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction. *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971); *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); *United States v. Humboldt Placer Mining Co.*, 8 IBLA 407 (1972). Although such a presumption can be overcome by evidence showing that a mineral deposit could have been extracted, removed and marketed at a profit on or prior to a given date, such findings have been rare. Cf. *Verrue v. United States*, 457 F.2d 1202 (9th Cir. 1972), rev'g *United States v. Verrue*, 75 I.D. 300 (1968); *United States v. Gibbs*, 13 IBLA 382 (1973); *United States v. Harenberg*, 9 IBLA 77 (1973); with cases cited above.

The Department of the Interior's seminal decision in determining whether there has been a discovery of a valuable mineral deposit is

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Castle v. Womble, supra. In that case an agricultural entryman had applied for a patent. Several mining claimants protested on the basis that they had discovered a valuable mineral deposit. In resolving the dispute, the Department tied the test of value to the concept of an operating mine as the desired end of the general mining law at 457:

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *

This formulation, often referred to as "the prudent man test," has received the continuing approval of the courts. *Chrisman v. Miller*, 197 U.S. 313, 322 (1905); *Cameron v. United States, supra*; *United States v. Coleman, supra*.

In the years since promulgation of the prudent man test, the Department has found it necessary to state explicitly that for a mineral deposit to be considered valuable it must be capable of extraction, removal and marketing at a profit. This test of marketability has been approved by the Supreme Court in *United States v. Coleman, supra*, at 602 as a logical complement to the prudent man test:

* * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man

test, and the marketability test which the Secretary has used here merely recognizes this fact.

The ruling in *Coleman*, approving the marketability test employed by the Department, is and has always been applicable to all mining claims. *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969), and cases cited therein at pp. 621-22.

The courts clearly defined value with respect to the purpose of the general mining law: the development of actual mining operations. It is equally clear that the level of anticipated profits must be sufficient to attract prudent investment capital to develop actual mining operations. For that reason we have held on several occasions that mineral deposits which will yield only meager profits are not valuable within the meaning of the general mining law, since no prudent man would invest in actual operations in those circumstances. *E.g., United States v. Edwards*, 9 IBLA 197, 203 (1973); *United States v. Harper*, 8 IBLA 357, 369 (1972).

In addition to the prudent man test and its logical complement, the marketability test,³ the Department has developed several standards to aid in the determination of value.

First, it must appear as a *present* fact that there would be a reasonable prospect of success in developing an operating mine that would

³ For an incisive and more extensive analysis of the application of the marketability test, see *United States v. Larsen*, 9 IBLA 247 (1973).

yield a reasonable profit. *Castle v. Womble*, *supra*; *Davis's Adm'r. v. Weibbold*, 139 U.S. 507, 523 (1891). Speculation with respect to future changes in market conditions, dramatic breakthroughs in technology, or the hoped-for discovery of a mother lode will not demonstrate as a *present* fact that a prudent man would be justified in initiating actual mining operations. *Foster v. Seaton*, 271 F. 2d 836, 838 (D.C. Cir. 1959); *United States v. Denison*, 76 I.D. 233, 239 (1969); *United States v. Jenkins*, 75 I.D. 312, 318 (1968); *United States v. Larsen*, *supra*, at 266.

The *Castle v. Womble* decision, as already noted, issued as a result of proceedings between an agricultural entryman and mineral claimants; this was the typical situation in which the mining law developed.⁴ It would have been inequitable to allow the defeat of a homestead entry by those asserting that the lands might someday be valuable for mining without demonstrating present value.

In addition to the historical concern for equity between competing claimants, there is a more fundamental reason for continued adherence to the present value require-

ment: there is no practical alternative. Lands may not pass from the public domain under the general mining law unless the Department is persuaded that they are valuable for mining. *United States v. Coleman*, *supra*. If marketability could be predicated upon possibilities of the future, the variables introduced would be endless. Since few, if any, of these variables are susceptible to reasonable predictability, the marketability test would be reduced to mere speculation, and any meaningful conclusion as to value would disappear in a sea of conjecture. The effects of permitting such vagueness in the administration of the law were accurately forecast by Judge Friendly in his lectures on administrative law: 1) capriciousness and 2) undue political influence.⁵

A second standard is that actions of others in the same or very nearly the same circumstances may be used as evidence of what would constitute prudent investment activity. For example, a mining claimant would be justified in initiating actual mining operations on mineral showings that are the same or very nearly the same as those where actual mining operations have been successfully brought to fruition by others. *See, e.g., Cascaden v. Bortolis*, 162 F. 267, 270 (9th Cir. 1908).

In the same manner, failure to undertake actual operations may be used as evidence that no prudent man would be justified in so doing.

⁴ There were other similar situations which give emphasis to the requirement that the property be valuable for mining as a present fact: 1) disputes between two mining claimants for the same area, where prior in time of discovery was prior in right; *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904); and 2) disputes over whether a placer claim was known to contain a mineral deposit at the time patent was issued. *United States v. Iron Silver Mining Co.*, *supra*.

⁵ H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 19-24 (1962).

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For instance, if mining claimants have held claims for several years and have attempted little or no development of actual operations, a presumption may be raised that there has been no discovery of a valuable mineral deposit. This was the case in *Cameron v. United States*, *supra*, where six years had elapsed from the date of location to the date of the hearing. There the Supreme Court stated at 457:

"* * * Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities."

For similar holdings, see *United States v. Ruddock*, 52 L.D. 313 (1927), where 17 years had elapsed without production; *Starks v. Mackey*, *supra*, note 2, 29 years; *United States v. White*, 72 I.D. 522 (1965), 38-39 years; and *United States v. Flurry*, A-30887 (March 5, 1968), where the Department stated:

"* * * the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do."

A third standard is that money expended on further exploration or further research, but not on initiation of actual operations, is evidence only that further exploration or research may be justified; it is *not* evidence that the mineral exposed is valuable, or that prudent men would be justified in initiating actual operations. *United States v.*

New Mexico Mines, Inc., 3 IBLA 101, 106 (1971).⁶

As previously noted, oil shale was withdrawn from location under the general mining law by the Mineral Leasing Act of February 25, 1920, 30 U.S.C. §§ 181, 193, 241 (1970). The mining claims which are the subject of the present appeal were located prior to the date of such withdrawal. Therefore, the validity of such claims must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as at the date of determination. *Barrows v. Hickel*, *supra*; *Mulkern v. Hammitt*, 326 F.2d 896 (9th Cir. 1964). If the claims were not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within the boundaries of the claims would not have been excepted from the effect of the withdrawal, and the claims could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market value of the mineral. *United States v. Henry*, 10 IBLA 195, 199 (1973); *United States v. Gunsight Mining Co.*, note 6, *supra*; *United States v. Pulliam*, 1 IBLA 143 (1970); *United States v. Duval*, 1 IBLA 103 (1970).

Even if the mining claims are supported by a valid discovery, it is clear that a discovery may be lost. We have frequently held that dis-

⁶ For an imaginative analogy, see *United States v. Gunsight Mining Co.*, 5 IBLA 62, 69 (1972).

covery may be "lost" due to exhaustion of the deposit or to changes in market conditions of substantial duration. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963), *citing with approval United States v. Logomarcini*, 60 I.D. 371, 373 (1949), and *United States v. Houston*, 66 I.D. 161, 165 (1959). See also *Mulkern v. Hammitt*, *supra*; *Adams v. United States*, 318 F.2d 861, 871 (9th Cir. 1963); *Multiple Use, Inc. v. Morton*, 353 F. Supp. 184 (D. Ariz. 1972), *aff'g United States v. Silverton Mining and Milling Co.*, 1 IBLA 15, 18 (1970); *United States v. Charleston Stone Products, Inc.*, 9 IBLA 94, 100 (1973); *United States v. Denison*, *supra*.

II. The Distribution and Development of Oil Shale

The geographic distribution and the history of the development of both foreign and domestic oil shale were very ably set forth in the opinion rendered by Judge Dalby. Accordingly, we adopt those portions of his decision which are set forth below, changing the numbers of the footnotes therein to follow ours sequentially.

BACKGROUND

Geographic Distribution of Oil Shale

The contested claims were located for oil shale. Oil shale is a fine-grained, laminated, sedimentary rock containing solid organic material called kerogen which, upon destructive distillation, will produce a substantial amount of oil. The kerogen is derived from deposition of aquatic plants and smaller amounts of animal life in lakes during various geo-

logical periods. Oil shale does not contain appreciable amounts of oil.

Oil shale was deposited in a wide span of the earth's geological history from the Cambrian to recent periods. Shale deposits that yield at least 10 gallons of oil per ton occur in all of the continents. There are both high and low grade oil shale deposits in Africa of Late Paleozoic and early Mesozoic age. In the Stanley Basin of the Congo, extensive deposits of oil shale of Triassic age exist in beds that aggregate about 30 feet in thickness and yield more than 25 gallons of oil per ton. There are extensive deposits in China, Israel, Jordan, Syria, Siberia, Thailand, Burma and Turkey. The oil shale resources of Asia have been estimated at 70 billion barrels in deposits that yield more than 25 gallons per ton. Deposits occur in Australia and New Zealand. The known higher grade deposits are estimated to contain 280 million barrels oil equivalent.

In Europe there are substantial oil shale deposits in the Balkan Peninsula and adjacent area, France, Germany, Great Britain, Italy, Austria, Switzerland, Luxembourg, Russia, Spain, Portugal and Sweden. The recoverable oil shale resources of Europe are estimated to contain a total of more than 30 billion barrels, mostly in shales that yield more than 25 gallons per ton. In South America, oil shale deposits are known to exist in Argentina, Brazil, Chile and Uruguay. These oil shale resources are estimated to contain 50 billion barrels of recoverable shale oil.

In the United States, deposits of oil shale of varying nature and extent have been reported in the States of Alabama, Alaska, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Michigan, Montana, Nevada, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming. A large fraction of shale deposits of the United States contain small amounts of organic matter

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which will yield from one to five gallons of oil per ton on destructive distillation. These rocks have not been considered as oil shale. In addition, some sandstones, siltstones and limestones contain solid organic matter which yield very small amounts of oil. Possibly half or more of the sedimentary rock areas of the country will yield a small amount of oil. Oil shale can, therefore, be subject to several definitions. One authority defines oil shale as organic-rich shale that yields at least 10 gallons (3.8) percent of oil per ton.⁷

The oil shales of highest concentration of organic matter are in the Green River Formation of Colorado, Utah and Wyoming and the Tigrupuk Formation in Alaska. These are the only North American oil shales in the United States in the 25 to 100 gallons per ton range. The Green River Formation shales of this grade have been estimated to contain 600 billion barrels. The Tigrupuk Alaskan shales of similar grade have been estimated to yield 250 billion barrels.⁸

The Green River Formation is considered by geologists to have been formed in an inland lake which, at one time, covered an area of some 13,000 square miles in the States of Colorado, Utah and Wyoming. The formation resulted from lake and stream depositions extending over a period of some eight to ten million years. During the course of the evolution of the Green River Formation, tuff beds were formed in localized areas from airborne volcanic ash. In some instances, fairly great thicknesses of tuff were deposited.⁹

* * * * *

Foreign Oil Shale Activity

Oil shale development in foreign countries stimulated interest in the possible development of Western United States

shales and has relevance in determining what expenditures might prudently be made in the United States. Several of the foreign deposits have been commercially exploited.

Production of fuels from oil shale preceded the production from petroleum. Shale oil was first produced in France in 1838. Subsequent oil shale operations were started in Scotland in 1850; Australia in 1865; Brazil in 1891; Germany in 1916; Sweden and Estonia in 1921; Spain in 1922; Manchuria in 1929; and South Africa in 1935. A number of these continued until recent years when they succumbed to economic pressures from the petroleum industry. Today, only the Estonian and Manchurian operations survive.¹⁰

In France, the shale oil industry grew until about 1864 when competition of imported petroleum caused a decline. The French Government, at least intermittently, provided support of one kind or another, such as imports duties on foreign petroleum or direct subsidies. In 1893, oil shale production was about 190,000 tons. By 1900, production reached 220,000 tons, increased to 500,000 tons during World War II, and then declined. The industry ceased in the early 1960's.¹¹

The Scottish industry used oil shale, recovered by underground mining, which assayed generally in the range of 25 to 35 gallons per ton. After 1850, more than 140 companies and individuals engaged in oil shale ventures. By 1870, these were reduced to 51, and by 1910 only six companies remained. By 1920, the operations were consolidated under one parent company, Scottish Oil Ltd. The Scottish oil shale production in the early 1870's was approximately 500,000 long tons per year and reached 3,000,000 tons annually by 1910. Production thereafter gradually declined to essentially nothing in 1964.¹²

⁷ G-97, pp. 3, 10-16; Tr. 3448, 3450, 3455.

The Contestant's exhibits are designated by the prefix "G" and the Contestee's by the prefix "C." "CFF" refers to the Contestee's Proposed Findings of Fact.

⁸ G-97, p. 9.

⁹ Tr. 83, 86, CFF-1; CFF-10.

¹⁰ G-290, pp. 29, 39; G-479, pp. 109, 110, 111; C-1025; CFF-45.

¹¹ G-281, p. 15; G-290, pp. 25, 26; G-419, p. 50; C-1025, pp. 1, 2.

¹² G-290, pp. 29, 30, 32, G-419, pp. 56, 57.

Oil Shale Activity in the United States

The oil shale industry in the United States started about 1850. By 1860 there were 53 companies producing oil by distillation of various bituminous substances, including oil shale. Natural petroleum was discovered at Titusville, Pennsylvania, in 1859 and the American petroleum industry came into being. This reduced the price of kerosene so much that oil shale operations became unprofitable. The plants were abandoned or adapted to petroleum refineries.¹³

Interest in oil shale revived in the 1910 to 1920 period and has continued to the present time.¹⁴

An examination of how prudent persons expended their means with respect to oil shale during this period will provide the guide in determining whether oil shale was, as of February 25, 1920, a valuable mineral. Because the evidence in this respect is massive, the examination is limited to some corporations and the Government, whose activities are directed by the composite judgment of experienced officers.

Robert M. Catlin, a businessman and a member of the American Institute of Mining and Metallurgical Engineers, between 1890 and 1915 purchased approximately 140 acres of oil shale land; leased approximately 480, and obtained an interest in 140 acres of unpatented mining claims. He visited Broxburn, Scotland, in 1901 to study the Scottish shale oil operation, and in 1914 began research and development with the Elko deposits. In 1915, a 100-foot shaft was sunk in his mining property. The following year he erected a 20-ton per day retort which proved unsatisfactory and was later dismantled. In 1917, he incorporated the "Catlin Shale Products Company" and transferred his oil shale land to the company for stock.¹⁵

In 1918, the company began the construction of eight 100-ton per day retorts which differed in design from the 1915 models. The retorts were in operation in May of 1919 and by July the new plant had produced 15,000 gallons of shale oil. A refrigerator plant, wax press, stills and agitator were added to the plant the latter part of 1919 and early 1920. Sometime later, probably 1920, the Catlin Company's retorts were shut down. A third retort, 40 feet high and 12½ feet in diameter, was constructed and put in operation in December of 1921. This retort was operated intermittently until October 18, 1924.¹⁶

In 1924, the shale oil products were offered for sale for the purpose of testing the market. The products apparently could not be marketed in competition with petroleum products. On December 23, 1930, the Company was dissolved. Its operation was admittedly experimental.¹⁷

The Oil Shale Mining Company was incorporated in Colorado on October 2, 1916, as a public stock company with a capitalization of \$100,000. It acquired six mining claims about 15 miles west of DeBeque, Colorado. In 1916, the company built a bunkhouse and a cookhouse near the claims. In 1917, the buildings were moved to a new location and an externally heated, six to eight-ton per day batch-type Henderson retort, 18 feet high and 12 to 15 inches in diameter, and a tramway were constructed. By the end of 1918 or the early part of 1919 the company had six of these retorts, only one of which was assembled and operated on an experimental basis. By 1920, the company experimented with a continuous type of retort, invented by its

of R. M. Catlin, Sr.; G-724N, Deeds 276-F, 278-F and 384-F; CFF-57, CFF-58, CFF-105.

¹³ G-722, Part I, pp. 19, 20, 43; G-724H, Catlin letter, May 19, 1919; G-724J, letters of October 13, 1919 and December 2, 1919; CFF-78.

¹⁷ G-722, Part I, pp. 13, 40, 41; G-722B; G-724B; G-124J, letter by R. M. Catlin dated August 8, 1919.

¹³ G-290, pp. 60, 61; G-419, p. 99; C-721, pp. 38-39; C-853, p. 151; CFF-288.

¹⁴ C-721, pp. 39-45.

¹⁵ G-23, p. 101; G-722, Part I, pp. 9, 10, 12, 17, 18; G-722, Part II, p. 30, G-724E, G-724G, Lease No. 4349; G-724I, pencil notes

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superintendent, A. V. Young, which was subsequently abandoned.¹⁸

The company produced a few barrels of oil in 1920 and 30 barrels in 1921. Oil shale for the retorts was obtained from small pits on the claims during the period from 1917 to 1921. By 1926, the company lost its properties through attachments.¹⁹

The Monarch Shale Oil Company was incorporated in October 1919. The corporation acquired 240 acres of oil shale land, located about 13 miles northeast of DeBeque, Colorado. By April 1921, the company had erected a Ginet retort (named after its inventor and president, Joseph H. Ginet), 18 to 25 feet long and 3½ feet in diameter, with a capacity of about 50 tons of shale per day. During 1921, the plant was operated on 11 or 12 occasions for short periods and produced a total of 71 barrels of shale oil. The retort was "not run to any extent" during 1922 and was not operated at all during 1923. Some test runs were made in 1924. The shale for charging the retort was taken from a tunnel driven 75 feet into the side of the cliff above the plant.²⁰

The Mount Logan Shale Mining and Refining Company was incorporated in Colorado in July 1917. It obtained seven unpatented mining claims located about five miles from DeBeque, Colorado, on Mount Logan. The company erected a plant in Western Colorado in 1918, using three Galloupe retorts of a 20-ton capacity per day. After test runs in 1919 and 1920 proved this retort to be unsatisfactory, the company erected a Simplex retort similar to the Galloupe. The Simplex was 21 to 30 feet long and about 3 feet wide with a capacity of about seven tons, producing 12 to 15 barrels a day. The company obtained its shale from a 100-foot tunnel into the cliff. The total

cost of the plant was estimated at approximately \$70,000. The corporation made some experimental runs of oil shale in 1920 and 1921. The company became defunct in October 1926.²¹

The Index Shale Oil Company was incorporated in Colorado in October 1920. It obtained possessory title to eight oil shale claims and equitable ownership in an additional 15 others. Index began constructing an experimental plant in 1920 about 15 miles northwest of DeBeque, Colorado, using the Brown retort invented by its largest stockholder, Harry L. Brown. The retort was 75 feet long, two and one-half feet in diameter. Experimental runs of oil shale indicated that changes in design and equipment were necessary. Additional equipment was added in 1926. In 1928 the company was in receivership. The corporation mined its shale from a tunnel driven 60 feet into the face of the cliff.²²

The March Oil Company was incorporated in August 20, 1917, in the State of Colorado by a group of businessmen, including K. C. Schuyler. The company's mining property, consisting of about 2,400 acres of oil shale, was located three to four miles north of Grand Valley on Parachute Creek. In 1917 the company leased its mining claims to K. C. Schuyler who agreed to work the claims and to refine and dispose of oil shale and its products. In 1920 and 1921 Schuyler and George Taff, working for or in partnership with Schuyler, constructed a plant at a cost of \$100,000. The plant consisted of some buildings and sheds, a one-and-one-half-mile tramway, crushers and engine. A retort was designed by Taff, ordered from a Wisconsin manufacturer, but never delivered. In mid-1921 a cable

¹⁸ G-115, pp. 4, 6, 7, 14, 15, 20, 27, 40, 47, 114, 115, 130-133, 139, G-241, p. 30.

¹⁹ G-115, pp. 28, 40, 113-118, 130; G-241, p. 30; CFF-57.

²⁰ G-116, pp. 4-8, 14, 20, 48, 67, 70, 71, 80, 86, 93, 101, 106, 119, 120; C-212.

²¹ G-61, No. 8; G-117, pp. 1, 7, 9, 10, 12, 15, 19, 20, 24, 31, 32, 34, 59, 61, 75, 89, 99-102, 118, 143, 145; G-168, p. 21; C-213, p. 326; C-455; C-457; C-959, pp. 31, 32; CFF-80, CFF-106.

²² G-118, pp. 1, 2, 31, 47, 49, 51, 52, 53-130, 154, 155, 163, 165, 166, 167; G-624E, pp. 172-207.

on the tram broke killing nine men. The plant was never completed.²³

The Continental Oil Shale Mining Company was incorporated in Arizona in November 1920. The company obtained mining claims by merger with the Oil Development Company. In 1919, it constructed a plant, 20 miles north of Rifle, Colorado, on Piceance Creek, consisting of a bunkhouse, a residence for a superintendent, a blacksmith shop, a crusher, and a Colorado continuous retort, invented by two Denver engineers. The vertical retort was about 22 feet high and two feet in diameter, having a capacity of 50 tons of shale per day.²⁴

Shell Oil Company became interested in oil shale by 1945. By August 1954, Shell had acquired 3,624 acres of oil shale property at a cost of \$123,014.35. Shell continued to acquire oil shale lands. In 1965, it entered into an option to purchase the Cathedral Bluff claims in the Piceance Creek Basin. The options on these 21,000 acres specified a purchase price of \$2,000 an acre. The total cost to Shell would be in excess of \$43,000,000, including \$1,000,000 as the cost of maintaining the option. In the span of 10 to 15 years, the price of oil shale lands to Shell had risen from 500 to 700 percent and in the two years prior to 1964 had risen as much as 250 percent. As of 1964, Shell's holdings consisted of 5,300 acres of fee property, options to purchase 3,300 acres of fee lands and options to purchase 24,400 acres of unpatented mining claims. During the period of acquisition of the oil shale claims, Shell made economic studies of the feasibility of extracting and refining oil from oil shale, but has no current plans for mining and processing oil shale.²⁵

Cities Service Company, through its subsidiary Empire Gas & Fuel Company, began locating oil shale claims in Sweetwater County, Wyoming, in 1918. By August 1923, the company asserted ownership in 48 claims, totaling 7,680 acres of oil shale land. The evidence does not indicate whether Cities Service Company presently asserts title to these early locations.²⁶

In early 1951, Cities Service Oil Company, a subsidiary of Empire Gas & Fuel Company, acquired an option to purchase 8,300 acres of oil shale land at \$50 per acre, which it exercised in 1953. Since 1952, Cities Service Oil Company has acquired about 10,000 acres of oil shale land in Garfield County, Colorado, at a cost of about \$500,000. Other than the acquisition of oil shale properties, Cities Service Oil Company's activities have been limited to core drilling and testing of oil shale samples. The company has no program for the commercial development of oil shale.²⁷

Standard Oil Company of California began investigating the possibilities of producing shale oil and refined products from oil shale in 1918. The investigation included geological examination of the oil shale in California, Nevada, Utah and Colorado, the "devices for utilization" of them, and an economic analysis of the possible profitability of doing so. Laboratory retorting experiments were conducted in 1920 and from 1925 to 1928. In 1921, the company obtained a patent for its process of "hydroxination of oil shale" developed by its research. In 1925, the company made intensive studies on the extraction of oil from solids.²⁸

Standard began the purchase of Colorado oil shale land in 1943. By 1954, it had acquired 39,736 acres of patented land, 8,057 acres of unpatented mining claims, and an option or a partial inter-

²³ G-61, No. 18; G-125, pp. 10, 15, 19, 21, 22, 30, 43; C-972, Exs. No. 1, pp. 1, 2, No. 3, p. 1, No. 4, p. 7; and Nos. 10 and 12; C-973, p. 54; CFF-81; CFF-353; CFF-358; CFF-362.

²⁴ G-61, No. 13; G-126, pp. 35, 44, 70, 71; G-168, p. 15; G-580, LL-4, pp. 1-16; C-454, p. 4.

²⁵ G-509, p. 31; G-514, pp. 31, 80, 81; C-741; Tr. 4815, 4816, 4844, 4848, 4916; CFF-318.

²⁶ G-636E, pp. 60, 111, 116, 129; G-636F, pp. 11, 16; CFF-110.

²⁷ G-636, pp. 7, 8, 9, 10, 12, 30; G-636F, pp. 18, 23, 24; CFF-314.

²⁸ G-629C, pp. 4, 12, 13, 27-47, 68, 69, 75, 78, 97, 98; C-723, Part I, p. 57; C-567, p. 1; CFF-110.

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est to 17,628 acres, for a total of 65,421 acres. The total cost of this acquisition was approximately \$5,000,000. By 1967, the company's patented land totaled approximately 44,000 acres in blocks of sufficient size to support a commercial oil shale operation. The company is now one of the largest holders of patented oil shale land.²⁹

Standard Oil Company of Ohio (Sohio) first became interested in oil shale in 1962. From 1964 through 1967 the company spent or obligated itself to spend \$28,800,000 for acquisition of 43,631 acres of patented oil shale lands in the Green River Formation. In addition, the company holds interests in options which, if exercised, would entail additional investments.³⁰

The Oil Shale Corporation (Tosco) interested Sohio in its retorting process. In September 1964, the two companies joined with Cleveland Cliffs Iron Company in a joint venture agreement and formed the Colony Development Corporation for the purposes, among others, of building and operating a prototype plant to determine the economic feasibility of the Tosco II process, developing an experimental mine and making engineering and cost studies directed to the establishment of a commercial oil shale operation. Facilities, including a 1,000-ton per day prototype retort, were constructed and placed in operation in 1965. During its subsequent operations the plant produced over 50,000 barrels of crude shale oil. By June of 1966 sufficient prototype data had been obtained to enable a qualified engineer to make an order of magnitude estimate of the capital cost of a commercial plant. The estimate came out substantially higher than the studies made prior to the construction of the plant. A difference of opinion relative to the causes and solution of this problem developed between the joint venturers. Sohio and Cleveland Cliffs felt that the problems of reducing

capital costs should first be solved, then the prototype redesigned and operated. Tosco wanted to operate the plant and solve the high capital cost problem simultaneously. The differences were solved in September 1966 by placing the agency company, Colony, on an inactive status, having Cleveland Cliffs continue the mining experiment for the joint accounts of the joint venturers, and permitting Tosco to continue operating the retort for its own account. If the project were successful, the joint venturers contemplated entering into a commercial operation. In accordance with the agreement, Sohio studied alternative processes for extracting oil from shale. In 1966 it agreed to an exchange of information with Union Oil Company after joint studies of Union's retorting process.³¹

Tosco holds an interest in over 30,000 acres of oil shale lands in Colorado and Utah acquired at a cost of about \$10,000,000.³²

Tosco's president testified that the company intends to have a commercial plant of approximately 53,000 barrels per calendar day "on stream" during 1970.³³

Texas Oil Company (Texaco) began exploring the possibilities of oil shale in 1918, and began acquiring interests in the oil shale lands of the Green River Formation in 1927 through the acquisition of the California Petroleum Company and its subsidiary, the Colorado-Ventura Company. Since 1927, the company has acquired 29,000 acres of patented oil shale lands in Colorado and Utah at a cost of \$1,500,000. From 1945 to 1947, Texaco made a refining study of oil shale for the Navy at its own expense. Beginning in 1957, after experimentation with other methods of extracting oil from shale, Texaco constructed and operated a pilot plant and developed its own "hydrotorting process for extraction of shale oil." The company has spent

²⁹ G-629, p. 28; G-629B; G-629D, p. 149; G-629E; CFF-311.

³⁰ G-604, pp. 8, 19-20; G-604A.

³¹ G-604, pp. 24, 25, 26, 29, 37; G-604C; Tr. 5063; CFF-298.

³² C-1065; CFF-316.

³³ Tr. 5069; CFF-328; CFF-332.

over \$1,000,000 in oil research in the past 20 years.³⁴

Mobil Oil Corporation's interest in oil shale began in 1940. A research program to evaluate the potential of shale as a source of oil was begun in 1943. A pilot plant was constructed at Paulsboro, New Jersey, and an experimental program was carried out between 1943 and 1945. Further research and study of oil shale was continued. Since 1965, the company has been conducting a research program at Anvil Points, in cooperation with five other major oil companies which includes additional refining, economic and mining studies. Mobil has, since 1955, purchased oil shale lands of the Green River Formation. At the present time, it holds an undivided half interest in 24,591 acres of patented oil shale land, the entire interest in 10,131 acres of patented oil shale land, for which it paid approximately \$3,000,000. It also holds an option to purchase 17,440 acres of unpatented oil shale claims and 330 acres of patented land which, if exercised, will cost an additional amount of approximately \$1,800,000.³⁵

Union Oil Company of California became interested in oil shale in 1920. Since 1920, the company has acquired an interest in 57,319 acres of oil shale land, of which 37,166 are patented, and a "surface only" interest in an additional 2,617 acres, at a cost of over \$2,500,000. Beginning in 1924, Union conducted studies of existing oil shale processes, made analyses of oil shale samples and undertook an oil shale research program. Starting in 1944, it constructed and operated an experimental retort with a two-ton per day capacity. In 1948 it completed a scale-up model with a 50-ton per day capacity which was dismantled in 1956. Union spent a total of \$438,000 on oil shale research from 1947 to 1954. On January 31, 1955, Union's Board of Directors approved a \$5,000,000 expenditure for a

two-year oil shale research project, which would include the erection of a demonstration plant in Colorado of one thousand tons per day capacity. The demonstration plant was started in 1955 and completed by May 1957. The plant was run intermittently into July 1958.³⁶

Major Oil Shale Holdings

Oil companies and other business interests have become interested in the commercial prospects for oil shale development. In addition to expenditures for developing technology, many companies have acquired interests in land containing oil shale deposits in the Green River Formation. In the Piceance Basin, the major owners of either patented or unpatented oil shale claims, were, as of 1964:

A. Large Oil Companies

Cities Service Company
Continental Oil Company
Getty Oil Company
Gulf Oil Company
Humble Oil & Refining Company
Marathon Oil Company
Pan American
Pure Oil Company
Shell Oil Company
Sinclair Oil Corporation
Socony Mobil Oil Company, Inc.
Standard Oil Company of California
Texaco, Inc.
Union Oil Company of California

B. Major Group Holdings

Dow Chemical Company
Doyle, et al.
Dutton
Eaton Shale Company
Energy Resources Technology Land Company
Gabbs Exploration Company
Kerogen
Massive Group
Oil Shale Corporation
Parachute Oil Shale Company
Ruth Group (Ertl et al.)
Savage Oil Shale Development Company

³⁴ G-642, pp. 20, 25, 26, 43-45, 51, G-642C, p. 41; G-642F, G-642G; CFF-313.

³⁵ G-633, pp. 8-10, 39, 40; G-633A; G-633B, p. 1; CFF-312.

³⁶ G-625, pp. 14, 15, letter dated June 20, 1920; G-626, pp. 61, 92, 112-117, 222, 232, G-895, G-927, pp. 2-4; C-905; C-907, pp. 5, 6, Fig. 5; C-910; CFF-310; CFF-317.

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Sunset Group (Gabbs Exploration Company)

Texas National Petroleum Company
Wasatch Development Company³⁷

Oil Shale Research by the United States Government

The United States Government conducted extensive oil shale research. A 1901 Government publication noted the occurrence of oil shales in Colorado and Utah. In 1913, efforts were started by the Government to determine the extent of the deposits and their oil potential. In about 1916, the Bureau of Mines began laboratory work on oil shale in Washington, D.C., and by 1919 laboratory facilities were operated in Utah.³⁸ The work in Utah included standardizing methods of testing, studying methods of assaying oil shale for commercially recoverable oil and ammonium sulfate, conducting retorting experiments on different oil shales and analyzing shale oils and other products manufactured by different retorting processes and refining the retorted oils to determine the commercial value of the refined products.³⁹

In January 1920, the Bureau of Mines established, under an agreement with the State of Colorado, a laboratory at Boulder, Colorado. The following month small scale experimental studies, concerned primarily with fundamentals of oil shale retorting and yields and characteristics of shale oil products, were begun.⁴⁰

In 1924, a Presidential Naval Fuel Oil Committee, appointed to study the problem of obtaining adequate supplies of fuel oils for the Navy, recommended that the Bureau of Mines determine the feasibility of oil shale as a source of shale oil. Congress authorized the construction of a pilot oil shale plant and during the four-year program appropriated more than \$229,000 for the study. The Bureau erected

two large-scale experimental retorts at Rulison, Colorado, the Pumpherson and the NTU, and opened a quarry at Anvil Points to provide oil shale for the program. The oil shale mine and the retort were operated periodically from 1926 through 1929. The refining studies showed that the shale oil could be refined to acceptable products, although less readily than conventional crude petroleum.⁴¹

In 1944, Congress passed the Synthetic Liquid Fuels Act (P.L. 290, 78th Cong., App. April 5, 1944; 58 Stat. 190, 30 U.S.C. 321 *et seq.*). The Act authorized the Secretary of the Interior to construct and operate demonstration and pilot plants to produce synthetic liquid fuels from oil shales, coal, agricultural and forestry products and other substances and to conduct laboratory research. The Bureau of Mines constructed a demonstration plant at Rifle, Colorado, which included two NTU retorts and opened an oil shale mine at Anvil Points. The retorts were first operated in May 1947.⁴²

Other pilot plant operations were conducted. One was at Pueblo, Colorado, using a Hayes low temperature coal carbonization retort under a cooperative agreement with the Colorado Fuel and Iron Corporation and another at Wilson Dam, Alabama, using a Royster retort owned by the Tennessee Valley Authority. As a result of the experience gained in the operation of the retorts and study of other processes, a Gas Flow retort was designed by the employees of the Bureau of Mines in 1946 and 1947. A retort embodying the principles considered to have the best prospects of success and a pilot plant incorporating these features was built at Rifle, Colorado. Later, another retort, the Dual-Flow, was designed, constructed and operated. Originally, the au-

³⁷ C-333, p. 5; CFF-309.

³⁸ G-419, p. 99; C-850, CFF-64.

³⁹ G-419, p. 99; C-8, p. 70; C-276; C-717; C-850; CFF-64; CFF-93.

⁴⁰ C-330.

⁴¹ G-246, pp. 1525, 1533-1534; G-302, pp. 299, 307; G-433, pp. 1, 5, 6, 25, 27, 150; C-277, p. 60; C-284; C-286-289; C-383, letter dated June 5, 1924, from Secretary Work to Director, Bureau of the Budget, pp. 1, 2; CFF-256; CFF-257; CFF-258.

⁴² G-139, p. 32; G-159.

thority of the Synthetic Liquid Fuels Act was limited to five years, but two amendments extended the period covered by the Act to a total of 11 years, ending in April 1959. During those 11 years about \$82,000,000 was expended. Of this amount, nearly \$22,000,00 was directly applicable to work on oil shale.⁴³

Since the end of the Synthetic Liquid Fuels Program, research work by the Federal Government has continued at the Bureau of Mines Research Center at Laramie, Wyoming. The annual budget for this work for the past 20 years has been about \$1,500,000.⁴⁴

The foregoing is illustrative of the expenditures made by corporations and the Government in the promotion and development of oil shale.

Cost Studies

An objective of the Bureau of Mines programs at Rulison and Rifle, the Union Oil Company's demonstration plant and the Tosco-Sohio-Cleveland-Cliffs operations, was to obtain data upon which an informed judgment could be made as to whether expenditures in an oil shale mine would be justified. Not until a commercially feasible mining and retorting process competitive with petroleum was developed could a prudent man expect to develop a profitable oil shale mine.

All of the cost studies indicated that oil shale was not competitive with petroleum. At the request of the Secretary of the Interior, the National Petroleum Council made a study in 1950 and 1951 of synthetic fuel costs, including synthetic fuels derived from oil shale and prepared a final report dated February 25, 1953. The Economic Subcommittee made estimates of the cost of producing gasoline from oil shale under various assumed conditions. These costs varied between 13.9 cents [per gallon], where the hypothetical plant included no housing or community development, to 15.2 cents where

the assumed operation included complete housing and community development, including housing for employees, housing for tradespeople, teachers, general community facilities comprising streets, utilities, schools, and commercial buildings. The Committee's reports stated that "neither of these cases [the minimum and maximum expenditures], however, is believed to represent the probable situation. In order to obtain an adequate stable labor supply at the minimum investment, it is the opinion of the Subcommittee that the housing program would approach that of [housing for employees and generally community facilities]." ⁴⁵

Where only general community facilities were provided, the Economic Subcommittee determined the cost of producing gasoline from oil shale would be 14.7 cents per gallon. The cost included taxes and an assumed six percent return on invested capital. The average refinery price for gasoline in Los Angeles at the time of the study was 11.7 cents per gallon. In the final report of the National Petroleum Council's Committee on Synthetic Liquid Fuels Production Costs, February 26, 1953, the committee stated that for each increase of one percent return on investment after taxes the gasoline costs from the single plant cases would be 1.3 cents per gallon. This ratio indicates the shale oil plant could, in 1951, have been operated at a slight profit. However, the committee concluded that a return of between 12 and 15 percent on total invested capital would be required in order to attract investment capital.⁴⁶

The Bureau of Mines made a cost study in 1951. While the Bureau and the National Petroleum Council were "in good agreement on many points," there was wide diversion on some items. The Bureau estimated that "with a capitalization of 50 percent equity and 50 percent borrowed funds, and with all products selling at market values, the rate of

⁴³ G-139, pp. 37, 41-44, 47, 90, 91; G-159; G-467, p. 1; C-545; CFF-308.

⁴⁴ Tr. 3472, CFF-308.

⁴⁵ G-300; G-451, Appendix A1, Appendix I40-41; CFF-334.

⁴⁶ G-300, p. 9; G-451, p. 29, Appendix I40.

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return on equity capital would be 11.2 percent after interest charges and income taxes," and stated: "Although this return is less than the average return of the petroleum industry, as indicated by published figures, it is high enough to warrant serious attention."⁴⁷

In 1965 and 1966 employees of the Bureau of Mines, augmented by outside consultants with backgrounds in mining, retorting and refining technology, cost engineering, marketing, economics and finance, prepared for use in this contest a cost analysis for commercial scale oil shale plants on the contested claims for the years 1915, 1918, 1919, 1920, and 1966. The primary purpose of the studies was to determine the prospective cost and profitability of a commercial oil shale installation at the selected points in time, based on the information available at that time, or on whatever assumptions would have been necessary and reasonable to one making such a study.⁴⁸

The design for the period 1915-1920 included the production of 1,000 tons of oil shale per day in an underground mine, crushing the shale, a battery of Pump-herston retorts as used in the Scottish oil shale industry, and a refinery producing shale oil gasoline, burning oil, gas-oil, residual fuel oil, coke and ammonium sulfate, as well as a railroad, housing for employees and supporting facilities.⁴⁹

The design for the 1966 period required mining of 60,300 tons of oil shale per day in an underground mine, crushing the mined shale, retorting the crushed shale in retorts of the gas combustion type, and treating and refining the shale oil at preliminary facilities in Colorado and a refinery in St. Louis. The products of the operation would be petroleum gasoline, diesel fuel, coke, ammonia, LPG, gas and sulphur. The plant and related facilities were estimated to require a capital investment of approximately \$185,000,000. The study showed the following yields after taxes.⁵⁰

Project	Book yield on equity (percent)	Book yield on net plant (percent)	True yield (percent)
1915-----	7.1	8.8	6.5
1918-----	6.6	8.3	7.0
1919-----	3.0	3.7	3.5
1920-----	Neg.	Neg.	0.0
1966-----	11.3	15.1	9.84

The study indicated the following maximum payback periods:

Project:	Years
1915-----	11.5
1918-----	10.7
1919-----	14.0
1920-----	18.8
1966-----	5.3

The various studies disclose that since about 1951 marketable products from oil shale of the Green River Formation could be produced in a commercial-scale instal-

lation at a profit. However, that profit would be too small to be competitive with petroleum or to attract prudent investment capital. In 1966 a minimum book yield of at least 14 percent after taxes, a true yield of at least 11 percent after taxes and a payback period of not less than 4.2 years would be required on typical new investment. For nontypical investment such as an oil shale plant, a higher rate of return would be required. Required book and equity yields during

⁴⁷ G-459, pp. II, III; CFF-335.

⁴⁸ G-139, p. 182; G-290, pp. 143, 146, 172; G-665; G-666; G-667; Tr. 3126, 3263-3272.

⁴⁹ G-665, pp. 1-18.

⁵⁰ G-667, 1966 Study, pp. 1-17, 51, Table 19; G-673; G-674; G-683, G-683A; Tr. 2348, 2353-2356; CFF-337.

the 1915 to 1920 period would probably have been higher than in 1966.⁵¹

Profitability of an Oil Shale Mine

As previously stated, the test of validity is whether an investor in an oil shale mine as of February 25, 1920, and since, had a reasonable prospect of developing a profitable mining operation.

Many millions have been spent on oil shale since the revival of interest in this mineral in the early 1900's. But substantially all of the expenditures that could be considered prudent were for (1) research and development of a technically and economically feasible mining and retorting process, or (2) purchase of mining claims. Until a research program had demonstrated that shale oil could be produced at a cost competitive with petroleum, no prudent person would attempt to develop an oil shale mine. He would have no market for his product. The very fact that, in the more than half a century of interest in oil shale claims for the Green River Formation, not one profitable mine has been developed is a compelling reason for concluding that expenditure of money to that end would be imprudent. As the Department said in *United States v. E. A. Barrows and Esther Barrows*, 76 I.D. 299 (1969) (at p. 306):

*** the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), affirmed in *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, [75 I.D. 300 (1968)].

[*Barrows* was subsequently affirmed. *Barrows v. Hickel*, 447 F. 2d 80 (9th Cir. 1971). *Verrue* was subsequently reversed, the Court holding in effect that the pre-

sumption of invalidity raised by lack of sales had been overcome. *Verrue v. United States*, 457 F. 2d 1202 (9th Cir. 1972).]

The Contestees argue that the money spent or obligated in the acquisition of oil shale claims, amounting to as much as \$2,000 per acre, proves that oil shale was a valuable mineral deposit and, therefore, "open to exploration and purchase" under the mining laws. Oil shale claims derive their market value from the expectation that at some time in the future shale oil will become competitive with petroleum. Market value of a mining claim is not the test for discovery of a "valuable mineral deposit." The mineralization must be such, not to justify the purchase of the mining claim for possible future development, but to justify present expenditures with a reasonable prospect of developing a profitable mine. "To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." *Foster v. Seaton*, 271 F. 2d 836 (at p. 838) (C.A. D.C. 1959).

* * * * *

The evidence may be summarized as follows. The history of both actual and attempted oil shale operations at home and abroad has been intimately connected with the development of the liquid petroleum industry. Generally, the rise of the modern petroleum industry paralleled the decline of commercial oil shale operations.

In Scotland and France once flourishing oil shale operations have declined to essentially nothing. In both cases the demise of oil shale operations was due to increasing availability of liquid petroleum at a price which made oil shale products unattractive. In Scotland this

⁵¹ G-688; G-683A; Tr. 2322, 2330, 2331, 2373, 2376, 2377; CFF-287; CFF-293—CFF-297; CFF-321—CFF-328.

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change was apparently due to natural market forces. In France oil shale was supported far beyond the time when it could compete on its own by a government program of subsidy and import controls. In the United States the demise of oil shale operations began with the discovery of liquid petroleum at Titusville, Pennsylvania, in 1859. Within a few years the domestic industry had succumbed.

Early in this century interest in the commercial exploitation of oil shale was revived. Again, the reason for this revival of interest was tied closely to the then-perceived vicissitudes of the liquid petroleum industry. With the advent of the automobile consumption of petroleum increased dramatically; it then seemed to some that the world's reserves of liquid petroleum would be exhausted within a few years. As a result, many claims, including the claims in these proceedings, were located in the few years prior to 1920 in what the Supreme Court has characterized as a period of speculative fever. *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 54 (1970). Innumerable attempts at achieving profitable operations were made, some on an experimental basis and some on a full-scale production basis. The result in every single case was failure to achieve a profitable operation. The reason is clear: the ultimate reduction of oil shale to oil was simply too costly to permit successful competition with liquid petroleum.

Since 1920 those principally interested in oil shale have been large oil companies and the Government. As appellees have pointed out, the large oil companies have spent several millions of dollars acquiring patented and unpatented mining claims; several millions have also been spent on research, mostly on establishing prototype operations. However, virtually no money has been expended on initiating actual commercial mining operations on these claims. One company that has attempted commercial operations on other claims (TOSCO) has failed to show either substantial production or profits. (Tr. 5063-5069.)

For its part, the Government has spent several millions over the years on prototype plants and on research aimed at finding new methods of processing oil shale at a cost more favorable with the costs of the liquid petroleum industry. The Government has never developed a plant capable of commercial production.

Both the oil industry and the Government prepared studies attempting to show with some precision the probable costs and rates of return of a hypothetical operation. The National Petroleum Council prepared a study in 1951 at the request of the Secretary of the Interior. (Ex. G-451.) The conclusion of that study was that a small rate of return could have been realized, but that such return was so much less than the rate of return the oil companies could achieve on other investments at that time that an oil

shale operation could not attract investment capital.

The Bureau of Mines also made a study in 1951 with some differences in the data and basic assumptions used by the National Petroleum Council. Though on some points the studies were in agreement, the Bureau of Mines study showed a substantially higher rate of return, 11.2 percent; but again, that return was less than the average rate of return in the oil industry and was therefore considered unlikely to attract investment capital. (Ex. G-459.)

Another study was prepared by the Bureau of Mines specifically for these contest proceedings. The study was made for the years 1915, 1918, 1919, 1920 and 1966. (Exs. G-666, 667.) Many experts in mining, engineering, and finance were consulted to determine the possible profitability of a hypothetical mining operation based on the best available methods of mining for each time period. For the 1915-1920 period the projected returns ranged from 0 percent to 7 percent. For 1966 the return was estimated at 9.84 percent on a net investment of \$185,000,000. In each case the projected rate of return was found to be too low to attract investment capital since the alternative investment opportunities available to the oil companies were far more attractive, especially considering the risks involved in initiating operations which had never succeeded before.

In the proceedings below appellant and appellees seriously questioned some of the assumptions

utilized in the studies. Appellant asserts that certain by-products which increase the revenues in the 1915-1920 period could not have been sold, and consequently no profit whatever could have been realized in that period. Appellees argue that the costs for community facilities necessary to attract sufficient labor were overstated. In addition, appellant has pointed to the disparity in the results of the 1951 studies as evidence of the inherent difficulties with these hypothetical studies.

We conclude as follows. First, as a historical fact, the commercial production of oil from oil shale has never been competitive with the liquid petroleum industry. Second, the hypothetical studies at best confirm that the commercial exploitation of oil shale would not be competitive with the liquid petroleum industry. Third, without exception, every oil shale operation that has been attempted in this country has failed to show profitable production. Fourth, appellees have held these claims for half a century without attempting to exploit them.

It is unlikely that any oil shale operation could have operated at a profit at the time these claims were located or at any time up to and including the time of these contest proceedings. In so concluding, we have obviously discounted the studies which show that a profit, however meager, could have resulted from actual operations. We do so for three principal reasons. First, the history of innumerable

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attempted operations admits of no other conclusion. In spite of what the hypothetical studies show, it remains an incontrovertible fact that there has never been a single oil shale operation in this country which could show profitable production.

Second, the studies themselves were not buttressed by the experience of successful commercial operations. While that in itself would not disqualify their use as evidence, it does make them heir to an infirmity which was expressed by Alfred North Whitehead in a lecture on historical foresight:

The main difficulty * * * is the power of collecting and selecting the facts relevant to the particular type of forecast which we wish to make. Discussions on the method of science wander off onto the topic of experiment. But experiment is nothing else than a mode of cooking the facts for the sake of exemplifying the law.⁵²

Third, a half century of failure to develop a single commercial operation, on these claims or any others, lends emphasis to the conclusions of the studies that whatever the rate of return, it would have been insufficient to attract investment capital in actual operations.⁵³

While oil shale can be found on these claims in great quantity, no attempt has ever been made to de-

velop those deposits. Therefore, the oil shale deposits found on these claims never have been a valuable mineral deposit within the meaning of the general mining law.

In order for a commercially profitable operation to come into being there must be either a dramatic improvement in the technology or an alteration of the economic forces which have always operated in this country to prevent the commercial production of oil shale. The significant increases in national and world population, the increasing American per capita demand for energy, the diminution of available supplies and reserves of other energy sources, the complexities of international politics and economics, and the new awareness of environmental considerations, all acting in combination, may indeed soon compel consumers to accept shale oil and to pay what always theretofore would have been an exorbitant and noncompetitive price.

However, speculation that oil shale may someday be valuable in an economic sense is not evidence of its present value as of 1920 or 1966. The right to receive title to federal public land cannot be supported by such speculation. To do so would be to reject scores of case authorities which define "valuable mineral deposits" as that term is employed in the statute. 30 U.S.C. § 22 (1970).⁵⁴

⁵² A. WHITEHEAD, *ADVENTURES OF IDEAS*, 88 (Free Press ed. 1967).

⁵³ If there were an actual mining operation on these claims which was earning the 9.84% return projected in the 1966 study we would be loath to declare the claims invalid. However, for reasons already stated, we do not believe that the studies are reliable.

⁵⁴ On November 30, 1973, the Department of the Interior announced a prototype leasing program, 38 F.R. 33186. Sealed bids were submitted and subsequently opened on January 8, 1974, and February 12, 1974. The high bid on January 8, for Colorado Tract C-A encompassing 5,089.70 acres was \$210,305,600. The

III. The Nature and Effect of Departmental Precedent

Between 1920 and 1960 the Department consistently recognized oil shale as a valuable mineral deposit. During that period 523 patents for 2,326 oil shale claims embracing 349,088 acres were issued. The theory upon which these claims were patented is set out in *Freeman v. Summers*, 52 L.D. 201 (1927).⁵⁵ The parties in *Freeman* were in a position similar to that of the parties in *Castle v. Womble*, 19 L.D. 455

high bid on February 12 for Colorado Tract C-B encompassing 5,093.90 acres was \$117,788,000.36. Subsequently, two tracts of comparable acreage in Utah were offered and received high bids of \$75,596,800 and \$45,103,200. Notwithstanding this vote of confidence in the future of oil shale as a source of oil, it must be noted that oil has not yet been produced from oil shale in paying quantities.

⁵⁵ *Freeman* was preceded by the *Instructions* of May 10, 1920, 47 L.D. 548 (1920), which stated that oil shale was a mineral of economic importance and that it was subject to location and appropriation under the mining laws, if valuable. The instructions were based in part on a letter dated May 23, 1916, from the Director, Geological Survey, to the Commissioner of the General Land Office, advising the Commissioner of the classification of certain lands. The Director stated in the letter:—

"In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the nonmineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type."

We would construe the 1920 Instructions as simply directing that oil shale patent applications be adjudicated on the same basis as applications based on the alleged discovery of other minerals. However, since approximately 200 patents were awarded before *Freeman* issued, such instructions were obviously con-

(1894). Summers had applied for patents to his homestead and stock-raising entries. Freeman and the Standard Shales Products Corporation protested on the basis that they had discovered a valuable mineral deposit, oil shale, on the same lands. That assertion was eventually sustained by the Department of the Interior. The issue in dispute in *Freeman*, from the beginning to the end of the proceedings, was not value. Rather, it was the extent to which geologic inference could be relied on to establish discovery of richer oil shale beds once thinner beds had been found.⁵⁶

The basic substantive error in *Freeman*, *supra* at 206 is its underlying assumption that possible future value for mining meets the requirement of present value:

While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and the fact that it constitutes an enormously valuable resource for future use by the American people.

strued as implicitly recognizing the future value concept expressly enunciated seven years later in *Freeman*.

Subsequent to *Freeman* the Department and the Bureau of Land Management issued various pronouncements relating to oil shale, some implicitly and others explicitly recognizing *Freeman v. Summers*. See, e.g., Departmental directive of May 1931 (Ex. G-149); BLM Monograph of April 1954 (Ex. C-317); BLM Director's Memorandum of September 9, 1957 (Ex. C-356).

⁵⁶ Basically, the mineral claimants asserted that a discovery of any part of the Green River formation was a discovery of a valuable mineral deposit, since eventually one would be lead from some thinner beds of shale to the richer ones.

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In the 102 years since enactment of the general mining law, value has always been determined upon present facts, not upon possibilities of the future. Ostensibly, the reasoning in *Freeman* with respect to future value was based on *Castle v. Womble*, *supra* at 457. But it was stated in that case that—

* * * the requirement relating to discovery refers to present facts, and not to the probabilities of the future.

In this case the presence of minerals is not based upon probabilities, belief and speculation alone, but upon facts, which, in the judgment of the register and receiver of your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed.

The only precedent cited in *Freeman* in support of the proposition of possible future value is *Narver v. Eastman*, 34 L.D. 123, 125 (1905). But *Narver* arose under the Timber and Stone Act of June 3, 1878, 20 Stat. 89 (repealed Aug. 1, 1955, 69 Stat. 434). It was not governed by the general mining law. In that case the granting of a patent to an agricultural entryman was protested by a claimant who had located the same area for building stone. The evidence clearly showed that the costs of extracting and marketing the stone far exceeded any possible revenues which might be realized from the sale of the stone. Nevertheless, based on reasoning which may only be described as obtuse, the land was found to be valuable for building stone:

* * * It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry, it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said that said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? * * *

This was the reasoning relied on by *Freeman* for the proposition that possible future value constitutes discovery of a valuable mineral deposit. We would agree that it is prudent for a farmer to sell his crops, even if there is no clear profit, assuming, however, that the costs of planting have already been incurred and that any *additional* costs such as harvesting and transportation will be *less* than the income to be realized from the sale of the crop. But if the farmer could foresee *before* planting the crop that he could not realize a profit, we do not believe that he or any other prudent man would undertake investment on those terms. Yet that was the case with the building stone claimants in *Narver* and with the oil shale claimants in *Freeman*. Since *Freeman* is clearly contrary to the mining law, we hold that it must be and is overruled.

Appellees argue, in effect,⁵⁷ that if *Freeman* and the policy enunciated therein are overruled, such action may only be given prospective application. They cite several lines of authority which hold that, in certain circumstances, long standing administrative interpretations of various statutes may not be overruled in a manner which would have a retroactive effect on those who have relied on the previous interpretation to their detriment. Those lines of authority may be roughly classified as follows: 1) public utility and postal rate cases, 2) decisions of this Department suggesting that new rules may be given only prospective application, and 3) administrative rulings of other agencies that changed statutory interpretations which had been followed since the enactment of the statute.

In public utility cases, after a hearing is held and a rate determined, the regulator may not later, upon the same or additional facts existing when its previous order was promulgated, require reparations of the carrier by holding that the original rate was too high and should be lowered. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). The postal

rate cases involve situations tantamount to a contract. The carriers had transported mail at the request of the Postmaster General with the fair implication that payment would be made on the accustomed basis. After the mail had been transported, changes in the interpretation of the statutes were made which lowered the rates. The Court held that to apply the lowered rates would improperly deny the carriers the higher rates that they had received for like services in the past and which they had relied on in the instant cases in undertaking to transport the mail. *United States v. Alabama Great Southern R.R. Co.*, 142 U.S. 615 (1892); *Luckenbach Steamship Co. v. United States*, 280 U.S. 173 (1930).

Both the postal rate cases and public utility decisions are inapposite, since the carriers and utilities had been actively induced by the Government to rely on certain rates. Neither appellees herein nor their predecessors in interest were similarly induced by the Government to locate these claims or to invest in their purchase or development.

The decisions of this Department advanced by appellees are equally inapposite, since they all have two characteristics in common which are not present in this case: 1) they all involved changes from one rule to another, either of which could be considered "correct" within the meaning of the statute, and 2) the original rules were in effect at the time the entries were made. Most of the cases cited concern timber cul-

⁵⁷ Appellees argue that since *Freeman* is so firmly entrenched in the mining law it may not now be overruled. Most of the case authority cited by appellees, however, supports the proposition that precedent may be overruled, but not applied retroactively. Since appellees have also argued at length that the *Freeman* proposition of prospective value is a "rule" which may only be changed prospectively, we assume that appellees do not mean to argue that *Freeman* may not be overruled at all, only that it may not be overruled in a retroactive manner.

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ture entries, where the rule in effect at the time the entries were made was subsequently changed, requiring a longer time period before patent would be allowed. *Mary R. Leonard*, 9 L.D. 189 (1889). In that case it was clear that either the old or the new rule would be a permissible reading of the statute. Further, the entry was made when the old rule was still in effect. For similar holdings, see *Rough Rider and Other Lode Claims*, 42 L.D. 584 (1913), which dealt with a local rule regarding discovery, and *Instructions*, 52 L.D. 631 (1929), which concerned monumenting requirements for oil shale placer claims. In this case, however, the only rule in effect at the time these claims were located and on February 25, 1920, was the prudent man test of *Castle v. Womble*, *supra*, requiring present marketability.

The other line of cases cited by appellees involves administrative changes in the interpretation of a statute from an interpretation that had been followed since enactment of the statute. For example, in *Robertson v. Downing*, 127 U.S. 607 (1888), customs officials attempted to reinterpret a statute contrary to the interpretation instituted shortly after its enactment. The Court stated that where a statute has been interpreted in a particular way, that interpretation should not be disturbed except for "the most cogent and persuasive reasons." *Id.* at 613. *Freeman*, however, arose more than half a century after enactment of the mining law and more than 30

years after the promulgation of the prudent man test in *Castle v. Womble*, *supra*. Moreover, *Freeman* was and is a departure from the consistent interpretation of the law by the Department and the courts.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court dealt at some length with the considerations to be weighed in determining whether to limit the effect of overruling prior decisions to prospective application only. The precise question in *Linkletter* was whether the overruling of *Wolf v. Colorado*, 338 U.S. 25 (1949), by *Mapp v. Ohio*, 367 U.S. 643 (1961), should be given retroactive effect or confined to prospective effect only. *Mapp* overruled *Wolf* to the extent that *Wolf* had held the "exclusionary rule" relating to illegal searches and seizures did not apply to proceedings in state court.⁵³ The basic considerations to be weighed are found in *Linkletter* and other cases, e.g., *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Those considerations include (1) the nature of the reliance placed on the precedent by the parties (2) the purpose of the statute or rule in light of public policy (3) the harm to the parties who have relied on the precedent to their detriment, and, conversely,

⁵³ The Supreme Court was careful to observe that there is no difference between civil and criminal cases in applying the doctrine of prospective application.

(4) the harm to either the government or to the public purpose.

Neither appellees nor their predecessors in interest could have relied on the Department's policy in 1920-1960 in locating the claims herein. The *Instructions* of May 10, 1920, were issued after oil shale was removed from location on February 25, 1920.⁵⁹ *Freeman* was not issued until September 30, 1927.

⁵⁹ Appellees would contend that the claimants could well have relied on previous departmental actions and pronouncements in locating these claims. They argue at great length that classification by the United States Geological Survey of the lands upon which the claims herein are located as valuable for oil shale in 1916 imputed value requisite to support a "discovery" thereon. However, the meaning of "value" in the 1916 classification order is quite different from value requisite for discovery under the general mining law. The Act of July 17, 1914, 38 Stat. 509, 30 U.S.C. § 121 *et seq.* (1970), upon which the 1916 classification was based, and its predecessors, the Acts of 1909 (35 Stat. 844) and 1910 (36 Stat. 583), reserved to the United States certain minerals (later interpreted to include oil shale) that are classified as valuable by the U.S.G.S., when the surface is conveyed under the nonmineral land laws. Included in the reservation in each Act is "the right to prospect for, mine and remove." Since, as the Department and the courts have consistently held, a demonstration of value for prospecting or further exploration is not a demonstration of value under the general mining law, "valuable" in the Act clearly did not mean that the deposits in the lands so classified would necessarily meet the test of discovery.

Similarly, the classification of lands as valuable for oil shale by the U.S.G.S. in 1916 was based on prospective value, the prospect that at some indefinite time in the future oil shale would become marketable. The standards by which the U.S.G.S. classified lands as valuable for minerals are found in its Bulletin No. 537, published in 1913, wherein it stated as to phosphate:

"The purely economic considerations of accessibility, means of transportation, and nearness to market are highly important in the problem of establishing a commercial mine but are not involved in the classification of the land as phosphate or nonphosphate land." (G-101, p. 128.)

Another mineral included in the 1914 Act

Moreover, locating a claim requires only a minimal expenditure. Reliance or no, location by itself involves no change of position. Nor did appellees rely on the *Freeman* policy in developing their claims, since they have not in fact developed them. This leaves the question of purchase.

The Shoup claims were quit-claimed to Karl Schuyler, Sr., in 1923. D. A. Shale, Inc., received title to such claims from Schuyler's widow, who inherited them in 1933 from her husband, and who, on July 6, 1960, incorporated D. A. Shale, Inc. Therefore, there is no evidence that D. A. Shale, Inc., or its predecessors invested more than a minimal amount in the purchase of the Shoup claims in reliance upon *Freeman* or otherwise. Al-

was potash. On page 137 of Bulletin 537, under the heading "Classification of Potash-Bearing Lands," it was stated:

" * * * as investigation by the scientists of the Government bureaus reveals promising localities, these localities, if they involve public lands, will be withdrawn from entry until their value as sources of potash can be demonstrated or disproved."

The oil shale classification orders, covering lands in Colorado, Utah and Wyoming, all stated:

"The oil shales * * * constitute an undeveloped source of petroleum * * * and it is now recognized as possible that these shales will prove equally important as a source of nitrogen.

* * * * *

In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be acquired under the nonmineral land laws." (Ex. G-99, pp. 3, 4, 6, 7, 10, 11.)

Clearly, the 1916 classification could not be relied upon as declaring that minerals in the lands reserved, if found in sufficient quantity, were sufficiently valuable to support a discovery. The value necessary to support discovery during 1916-1920 was present economic value.

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though Shell Oil Company expended some \$18,780 in perfecting title to and preparing patent application for the Mountain Boy claims before 1964, it did not purchase the Mountain Boy Nos. 1, 6 and 7 from Frank Winegar for \$30,000 until *after* initiation of the contest proceedings. Moreover, the Department had not patented an oil shale claims since 1960. Accordingly, Shell could not have reasonably relied on the Department's continue adherence to *Freeman* when it purchased the claims.

That appellees will suffer financial harm should the claims be invalidated does not justify the perpetuation of error in interpretation of the mining law and the consequent disposition of the public lands to those not otherwise entitled to receive them. Perpetuation of such error would serve neither the mineral law nor the public interest.

Even if appellees had relied on the Department's continued adherence to *Freeman* to their detriment, the purchase of mining claims without a reasonable prospect of present, profitable development is simply a speculative venture. Preventing the disposition and dissipation of the public lands on the basis of speculation on their possible future value is a most cogent and persuasive reason for refusing to follow the policy enunciated in *Freeman*. The Secretary of the Interior has plenary authority over the disposition of the public lands. *Cameron v. United States*, 252 U.S. 450, 460 (1920). The Secretary's

duties as trustee of the public lands for the people of the United States

* * * oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. * * *

Knight v. United States Land Ass'n., 142 U.S. 161, 181 (1891).

To allow such land to be removed from the public domain because unforeseeable developments might someday make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959). The obligation of the Secretary requires that claims such as those herein, which are being held for speculative purposes in the hope that at some future date the necessary technology will develop to make extraction of oil from oil shale a profitable venture, should not be patented.

In a recent District Court case, *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd per curiam* (D.C. Cir. No. 73-1520, March 12, 1974), it was held that the Department of the Interior is not estopped by a former interpretation of a statute, however longstanding, from correcting what it feels to be clearly erroneous. The District Court quoted with approval *N.L.R.B. v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944), *cert. denied*, 321 U.S. 795 (1944), which held:

* * * An administrative agency, charged with the protection of the pub-

lic interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. * * *

See also *Automobile Club of Michigan v. Commissioner of Internal Revenue*, 353 U.S. 180, 183 (1957); *United States v. California*, 332 U.S. 19, 39-40 (1947):

Appellees allude to *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935), and *Wilbur v. United States ex. rel. Krushnic*, 280 U.S. 306 (1930). The validity of certain oil shale claims was challenged by the Secretary of the Interior for failure to perform certain assessment work. The Supreme Court held in both cases that the claims were "maintained" within the meaning of the savings clause, section 37, of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (1972). Both decisions suggested that failure to do assessment work gave the Government no ground for forfeiture, but inured only to the benefit of relocators. In *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), the Supreme Court concluded that *Krushnic* and *Virginia-Colorado* must be confined to situations which existed in those cases, *i.e.*, where there had been substantial compliance with the assessment work requirements of the mining laws, 30 U.S.C. § 28 (1970), so that "possessory title" of a claim-

ant would not be disturbed on insubstantial grounds.

The issue of discovery was not joined in *Krushnic* or *Virginia-Colorado*. Thus, neither decision is pertinent to the disposition of the case before us. The mining claims herein were not challenged for failure to perform assessment work, but for lack of discovery of a valuable mineral deposit. Accordingly, we are not concerned with the assessment work requirements of 30 U.S.C. § 28 (1970), but with the question of discovery within the meaning of the mining laws. We hold that no discovery of a valuable mineral deposit has been established on the claims at issue herein.

Appellees' other arguments have been fully considered and are not persuasive. Since its inception the general mining law has been interpreted by this Department and the courts to require as a condition of discovery that a mineral be presently marketable. Between 1920 and 1960 a different standard—possible future marketability—was applied to oil shale. Appellees contend the application of such standard was correct, but, if not, must continue to bind the Department. We reject both contentions. Application of such standard to oil shale was contrary to the mining law. Its continued application to oil shale is

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contrary to law and in derogation of the Secretary's responsibility as trustee of the public lands for the people of the United States.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Dent D. Dalby is reversed, and Mountain Boy Nos. 6 and 7 placer mining claims, and Harold Shoup

Nos. 1, 2, 3 and 4 placer mining claims are declared null and void.

NEWTON FRISHBERG,
Chief Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

June 28, 1974

A. W. SCHUNK *

INTERIOR BOARD OF LAND
APPEALS

16 IBLA 191

Decided June 28, 1974

Appeal from decision of the Arizona State Office, Bureau of Land Management, A-6724, declaring the Mizer Nos. 55, 60-62 mining claims null and void in part.

Vacated.

Rules of Practice: Supervisory Authority of the Secretary—Administrative Practice

In the exercise of its delegated authority pursuant to 43 CFR 4.1, the Interior Board of Land Appeals need not limit its review to a narrow issue where to do so would preserve error or inequity.

Mining Claims: Lands Subject to—
Mining Claims: Determination of
Validity

A permit issued by the Forest Service for a transmission line right-of-way under 16 U.S.C. § 522 (1970) does not serve as a withdrawal or close the land to mineral location. A Bureau of Land Management decision will be vacated where it invalidated mining claims because they conflicted with a transmission line right-of-way issued under the authority of 16 U.S.C. § 522.

APPEARANCES: A. W. Schunk, *pro se*; Richard L. Fowler, Esq., Office of General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Forest Service; William A. Simpson, Manager, Land Department, for the Arizona Public Service Company.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Acting upon information furnished by the Forest Service, the Arizona State Office, Bureau of Land Management (BLM), rendered a decision on July 31, 1972, holding the Mizer Nos. 55, 60, 61 and 62 mining claims invalid insofar as they conflicted with a right-of-way issued in February 1961 by the Forest Service, Department of Agriculture, to the Arizona Public Service Company. The Mizer claims were located in 1970. The decision recited that in accordance with 44 L.D. 513 (1916) the lands covered by the right-of-way were closed to mineral location and that mining claims located in conflict therewith are invalid.

A timely appeal was filed by Mr. R. H. Fairchild on behalf of A. W. Schunk on August 15, 1972. Fairchild's authority to act as attorney-in-fact was confirmed on September 12, 1972. Appellant does not question the correctness of the decision below. Rather, he argues that it would be unfair to deprive him of his investment in the claims. He states that he is willing to comply with reasonable safety requirements to prevent interference with use of the right-of-way.

While the appeal is subject to dismissal because the statement of reasons did not respond to the BLM decision, 43 CFR 4.412, to dismiss the appeal would perpetuate an error. Accordingly, and in recognition of its effect upon appellant's

* Not in Chronological Order.

rights, we address ourselves to the decision below.

The Forest Service requested BLM to initiate contest proceedings against the Mizer Nos. 55-64 mining claims because of lack of discovery. However, BLM declared the Mizer Nos. 55, 60 and 62 null and void to the extent those claims conflicted with a previously issued right-of-way for transmission line purposes to a private corporation, Arizona Public Service Co. The mining claims were located in 1970. The right-of-way was authorized in 1962 by a permit issued under the authority of the Act of February 15, 1901 (31 Stat. 790), 16 U.S.C. § 522 (43 U.S.C. § 959) (1970). That Act, in pertinent part, provides:

* * * That any permission given by the Secretary * * * under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any national forest [public land, reservation or park].

The plain meaning of the statute authorizes the issuance of permits which create no rights in land and by the statutory terms do not close land to the operation of the general land laws. A permit under the Act is nonexclusive. This concept accords with *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839), and is reiterated in the Forest Service Manual § 2811.24. In *Wilcox*, Jackson sought to enter lands at Ft. Dearborn in Chicago even as the Army vacated the post. However, the Indian Department was then using the vacated premises for warehousing and other related pur-

poses. Jackson's entry was thwarted. The Supreme Court held that when a tract of land is severed from the mass of the public domain it is not subject to appropriation under the general land laws. Lands used by the Government for public purposes are so appropriated. This case serves as the basis for the Instructions at 44 L.D. 359 (1915) and 44 L.D. 513 (1916). The Instructions concern telephone lines or like structures, constructed, maintained and operated by the United States over public lands under the authority of certain appropriation acts. They do not refer, explicitly or implicitly, to privately owned, maintained or operated lines. It was directed that where entry is made on lands upon which the United States had constructed telephone, telegraph, or other improvements the entry is subject to the continued use by the Government and the patent would be so noted. To similar effect *see* 43 CFR 1821.4-1, 2801.1-2.¹

The Department adheres to the *Wilcox* rule. The same rule is applicable in the National Forests. The Forest Service Manual, § 2811.25, states that lands occupied or used

¹ 43 CFR § 1821.4-1 Notation of rights-of-way.

"(a) In order that all persons making entry of public lands which are affected by rights-of-way may have actual notice thereof, a reference to such right-of-way should be made upon the original entry papers and upon the notice of allowance of the application issued to the entryman."

43 CFR § 2801.1-2 Disposals subject to right-of-way:

"All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way."

under a special use permit are closed to mineral entry in such circumstances. The Forest Service Manual provision cites *United States v. Mobley*, 45 F. Supp. 407 (N.D. Calif. 1942); and *Schaub v. United States*, 207 F.2d 325 (9th Cir. 1953).

In *Mobley*, the Court found that no discovery of a valuable mineral had been made upon the mining claims. The discussion concerning the impact of the special use permit as closing the land to the operation of the mining laws may therefore be regarded as obiter dicta. As to the abortive attempt to locate a mining claim, the Court said at page 414:

* * * * *

We conclude that neither defendant has any valid right, possessory or other, which he or she can assert against the Government of the United States, or any of its permittees, and that the Government is entitled to a decree quieting its title to the parcel of land, as prayed for in its complaint, and a permanent injunction enjoining the defendants from asserting any right to it or interfering with the possession of any persons acting under the authority of the Government.

In *Schaub* a material site had been designated for use in connection with Federal Aid Highway construction under 23 U.S.C. § 18 (1946), now § 317 (1970). The material pit was also designated for special use under the Act of March 30, 1948, 62 Stat. 100 (formerly 48 U.S.C. § 341 (1954)). Under that Act the Secretary of Agriculture

may authorize use of national forest lands in Alaska for various purposes:

* * * and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: * * *.

The Court held that the federal use of the lands for material site purposes effectively closed the lands from further appropriation.

In *Schaub* the mineral claimant sought to acquire mineral materials which were then being mined by or for the United States for federal use.

But where the Forest Service proposed an administrative site, surveyed the parcel for that purpose in 1909, and had made minimum improvements which subsequently became derelict, the Department held that the mere proposal for construction was insufficient to effect the withdrawal of any unimproved land from mineral location. *United States v. Crocker*, 60 I.D. 285 (1949). In citing the 44 L.D. Instructions, mandate was given that the telephone lines and a road constructed and used on public lands do not withdraw the land, but the telephone lines and the road could be excepted from the patent.

We note that as early as 1922 the Federal Power Commission and the Department recognized that lands withdrawn or classified for power purposes for transmission lines and

lands within permits or approved rights-of-way, issued under 16 U.S.C. §§ 420 and 523, and 43 U.S.C. § 961, should and must remain open to location subject to the provisions of section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970).² In this case, the permit, issued under an authority which cannot "confer any right, or easement, or interest in, to or over any national forest: lands, created no vested interest in the land." The utility company holds nothing more than a revocable permit to maintain a transmission line. At most, it may be afforded the protection outlined in *Crocker, supra*, and 43 CFR 2801.1-2.

We have considered the briefs filed by the parties pursuant to our order of March 12, 1974. Nothing contained in the briefs vitiates our conclusion that the issuance of a permit for a privately owned transmission line right-of-way by the Forest Service does not segregate or withdraw the land covered thereby from the operation of the

mining laws. *Southern Idaho Conf. Ass'n. of Seventh Day Adventists v. United States*, 418 F. 2d 411 (9th Cir. 1969), is not to the contrary; a material site granted under 23 U.S.C. § 317 (1970) is clearly an appropriation of the land. That is so by reason of the specific language of the Federal Aid Highway Act, apart from any other considerations which may be pertinent.

No authority has been cited for the application of Forest Service Manual sec. 2811.25 to the factual situation herein. General withdrawal authority is delegated to the Secretary of the Interior. 43 U.S.C. §§ 141-42 (1970); Executive Order No. 10355, 17 F.R. 4831. Since the private use of Arizona Public Service is not a use by the United States within the ambit of 44 L.D. 359 or 44 L.D. 513, the permit does not, by virtue of the 44 L.D. doctrines, serve to withdraw the land from the operation of the mining laws. The mining claims are not invalid for the reasons assigned by the Bureau of Land Management or by reason of the lands being affected by a transmission line right-of-way granted under the 1901 Act.

Therefore, pursuant to the authority delegated by the Secretary, to the Board of Land Appeals, 43 CFR 4.1, contestant's motion for dismissal of the appeal is denied and the decision below is vacated.

FREDERICK FISHMAN,
Administrative Judge.

I CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

² 43 CFR § 2344.2 General determination under section 24:

"(a) On April 17, 1922, the Federal Power Commission made a general determination 'that where lands of the United States have heretofore been, or hereafter may be, reserved or classified as powersites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the commission determines that the value of such lands so reserved or classified or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act.'"

ADMINISTRATIVE JUDGE STUEBING CONCURRING IN PART; DISSENTING IN PART

I agree absolutely with the holding in the majority opinion. The Forest Service cannot withdraw public domain lands from the operation of the Federal laws relating to the use and disposition of such lands by issuing a special use permit to a non-federal applicant, save only where a statute specifically provides that a permit will have such effect. In the absence of a formal withdrawal, the extent of an appropriation of lands by the Government for a valid federal use is determined by the extent of the improvements and actual use and occupancy of the land for such purposes. *A. J. Katches*, A-29079 (December 4, 1962) and cases cited therein; cf. *Instructions*, 44 L.D. 513 (1916); see also *Rights of Way—Forest Reserves—Jurisdiction*, 33 L.D. 609 (1905). The Secretary of Agriculture is not expressly or impliedly authorized to withdraw unimproved national forest land from mining location. *United States v. Crocker*, 60 I.D. 285 (1949).

The purpose of this separate concurrence is not only to emphasize my agreement with the majority view regarding the nonsegregative effect of a special use permit issued by the Forest Service under these circumstances, but also to further explore the authority by which this Board may review a case on appeal

despite a serious procedural deficiency.

The case has not been properly brought before us, having been presented by one who is not authorized to practice. Qualifications to practice before the Department of the Interior are prescribed by 43 CFR Part 1. One who does not appear to fall within any of the categories of persons authorized to practice does not become so qualified merely because he is designated "attorney in fact" for the appellant, and an appeal brought by one not eligible to practice is subject to dismissal. *Henry H. Ledger*, 13 IBLA 356 (1973). The appeal is therefore subject to dismissal. The majority find that it is nevertheless within the scope of its authority to disregard the procedural deficiency and consider the matter on its merits, noting that dismissal for this reason is not mandatory. I agree. However, the Board has no inherent authority of its own. It exercises only the delegated authority of the Secretary of the Interior, and unless the Secretary has authority to consider such an appeal on its merits and has delegated that authority to this Board, the appeal must be dismissed.

However, it has been held repeatedly that as long as public lands remain under the care and control of the Department its power to inquire into the extent and validity of rights claimed against the Government and to correct its own errors does not cease. *George L. Ramsey*, 58 I.D. 272, 304 (1943),

and cases cited therein. In *Knight v. United States Land Ass'n.*, 142 U.S. 161, 181 (1891), the United States Supreme Court held:

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. * * *

In *Pueblo of San Francisco*, 5 L.D. 483, 494 (1887), Secretary Lamar stated:

The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. * * *

Clearly the Secretary has authority to consider and decide a case in which there is a defective appeal. This brings to the foreground the

question whether this Board also has that authority.

The regulation, 43 CFR 4.1, provides in part:

§ 4.1 Scope of authority; applicable regulations.

The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary.

* * * * *

(3) *Board of Land Appeals.* The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf. Special procedures for hearings, appeals and contests in public lands cases are contained in Subpart E of this part.

Since the Office of Hearings and Appeals has authority to hear, consider and determine "as fully and finally as might the Secretary, matters within the jurisdiction of the Department" involving public land matters, *inter alia*, and that specific function (as to public land matters) is vested in this Board, we may consider an appeal on its merits, despite procedural deficiencies, where sufficient reason for so doing is apparent and dismissal is not required by regulation.

The case at bar involves a fundamental misconception of land

(DECEASED CHEYENNE UNALLOTTED)

July 10, 1974

status on the part of a field official of the Bureau of Land Management. To avoid an unjust result in this instance and to prevent the perpetuation and repetition of the error in future cases, it is entirely appropriate that we review and decide the matter on its merits. This action in no way obligates us to accord similar consideration to other cases involving the same kind of procedural deficiency. Such cases continue to be subject to dismissal.

EDWARD W. STUEBING,
Administrative Judge.

ESTATE OF IRENA (IRENE) CROWNECK HAWK (DECEASED CHEYENNE UNALLOTTED)

3 IBIA 1 Decided *July 10, 1974*

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Affirmed.

370.0 Indian Probate: Rehearing: Generally

A request for a rehearing that submits no new evidence and alleges no additional grounds for reconsideration than was presented at an earlier appeal for a rehearing, will be denied.

370.0 Indian Probate: Rehearing: Generally

A petition for rehearing based on evidence which fails effectively to controvert the basis for the initial decision in the matter, will be rejected.

130.3 Indian Probate: Appeal: Administrative Law Judge as Trier of Facts

When the views of witnesses are conflicting, the findings of the Administrative Law Judge, as the Trier of Facts and as one who had the opportunity to observe the witnesses, shall be given great weight.

APPEARANCES: C. C. Arney, attorney for appellant, Lena Abbie Big Bear Yellow Eagle; John W. Donley, attorney for David Fan Man, Sr., Bill Junior Red Bird, Wilma Red Bird Dyer, Joseph (Joe) Red Bird, Irene Red Bird Yellow Hawk Goodbear, appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Lena Abbie Yellow Eagle, hereinafter referred to as appellant, through her attorney, C. C. Arney, has filed with this Board an appeal from an Administrative Law Judge's denial of her petition for rehearing.

According to the record Irena (Irene) Crowneck Hawk, herein after referred to as the testatrix, died testate January 9, 1972. Hearings were held on July 17, 1972, and November 1, 1972, for the purpose of ascertaining her heirs at law, considering claims against her estate and probating her last wills and testaments, dated October 22, 1971, and June 10, 1957.

Thereafter, on January 19, 1973, Administrative Law Judge John F. Curran issued and entered an order,

where among other things, the testatrix's last will and testament of October 22, 1971, was disapproved and her last will and testament, dated June 10, 1957, approved.

The appellant, the sole devisee and beneficiary under the disapproved last will and testament of October 22, 1971, filed a petition for rehearing in the matter under date of March 13, 1973, alleging in support thereof the following reasons:

1. Upon newly discovered evidence, as set forth by the attached Affidavits, marked EXHIBITS "A" and "B," and the reason said new evidence was not presented at the prior hearings was because the witnesses were not available at that time.

2. The testimony of Dr. John Huser, upon which the Hearing Examiner placed such great importance, is not complete in that on page 82 of the transcript of the hearing held on November 1, 1972, the Doctor testified that the decedent was suffering from senility due to arteriosclerotic condition; and on page 84 of the transcript the Doctor testified that none of the medications prescribed by him were for arteriosclerosis and that he may not have given her any.

The Judge on May 8, 1973, denied the petition for rehearing for the following reasons:

1. Attached to the petition are affidavits of Medicine Woman Big Nose and Lillie Armstrong who state that they visited with the decedent in August and September of 1971 and that she was mentally competent. The testimony of these persons on a rehearing would be merely cumulative testimony. Erma Gean Tso-taddle and Sarah Heap of Birds both testified at the hearing on November 1, 1972, that the decedent was competent during that period of time. (Tr. 42, 43, 48, 49) It is a general rule of law that a new trial or rehearing will not be

granted on grounds of newly discovered evidence if such evidence is only cumulative in nature. (See *Green v. Burns*, 204 Okla. 415, 230 P. 2nd 892, 1951.)

2. The transcript is complete and accurate as to the testimony of Dr. John Huser. (Tr. 80-85) Dr. Huser testified that the decedent had a "generalized arteriosclerotic" condition. (Tr. 81) In answer to a question as to whether he prescribed medication for arteriosclerosis, Dr. Huser testified that, "No, so I may not have given her any, I didn't check the record that closely". (Tr. 84) The testimony of Dr. John Huser is clear, cogent and consistent as to the mental condition of the decedent.

It is from the foregoing denial that the appeal herein has been taken. The appellant, in support of her appeal, in essence alleges (1) that testatrix had the requisite mental capacity to execute the last will and testament dated October 22, 1971, and (2) that the last will and testament, dated June 10, 1957, as approved, was not properly witnessed and attested to.

The evidence, regarding above Item (1), is disputed and conflicting according to the record.

In situations where testimony presented by opposing parties is conflicting and highly disputed, the decision of the Judge, as the trier of the facts, should be given great weight for the reason that he had the opportunity to observe the witnesses and to evaluate their testimony directly. *Estate of Sam Pierre Alexander*, IA-918. (December 9, 1960 and February 7, 1961).

The appellant's contention set forth in above Item (2) we note was considered and disposed of by the Judge in his Order Approving Will

July 10, 1974

and Decreeing Distribution, dated January 19, 1973, copy whereof is attached hereto as Appendix "A" and made a part hereof, and we see no reason to reconsider it herein.

Having reviewed and considered the record, the Board finds that the appellant has shown no compelling reason why the findings set forth in the Administrative Law Judge's Order Denying Petition For Rehearing of May 8, 1973, copy whereof is attached hereto as Appendix "B" and made a part hereof, should not be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge, dated May 8, 1973, be and the same is hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

APPENDIX "A"

IN THE MATTER OF THE
ESTATE OF: Irena (Irene)
Crowneck Hawk, deceased Chey-
enne Unallottee

ORDER APPROVING WILL AND DECREEING DISTRI- BUTION

This case coming on to be heard before the Administrative Law Judge, Office of Hearings and Appeals, Tulsa, Oklahoma, and upon submission of the evidence, the following facts and conclusions of law are found:

1. Notices of hearing on this estate were duly served and posted as required by law.

2. A hearing was held at Concho & Weatherford, Oklahoma, on July 17 & November 1, 1972, for the purpose of ascertaining the heirs at law of the decedent, claims against the estate, if any, and the probate of the purported last will and testament dated October 22, 1971; and June 10, 1957.

3. The decedent died on January 9, 1972, at the age of 75, a resident of the State of Oklahoma.

4. The Administrative Law Judge has jurisdiction of the subject matter of this proceeding.

5. The following are the heirs at law of the decedent, determined in accordance with the laws of the State of Oklahoma, whose shares in the estate had the decedent died intestate, would be:

Nettie Black Tyler Starr (White, Buffalo Woman), Cheyenne Unallottee, Aunt, All.

6. The decedent owned trust or restricted property hereinafter described.

7. (A) Under the terms of the last will and testament dated October 22, 1971, the decedent devised all of her property to Lena Abbie Yellow Eagle. This will was contested on the ground that the decedent did not have the testamentary capacity to make the will. This will was drafted by a local attorney in Weatherford, Oklahoma, and the evidence shows that the will was executed in the manner required by law.

(B) There was conflicting evidence as to the testamentary capacity of the decedent at the time of the execution of the said will. Lola Little Bird, the owner and operator of a nursing home, testified that the decedent was a patient in the nursing home during the period from November of 1970 until July of 1971. She testified that the decedent did not know what property she owned and was very difficult to communicate with because she spoke primarily in the Indian language. She also testified as to the conduct of the decedent which would indicate her incompetency (Tr. 55, 56, 57).

(C) Alma N. Johnson, the Director of Nurses at the Methodist Nursing Home, Clinton, Oklahoma, testified that the decedent was admitted to the nursing home on December 1, 1971; discharged on December 16, 1971, readmitted on January 7, 1972, and died on January 9, 1972 (Tr. 61). She testified as to the conduct of the decedent which would indicate incompetency and she further testified that the decedent "didn't seem to know and understand what was going on" (Tr. 62).

(D) Dr. John M. Huser, Jr. testified that the decedent was his patient while she was in the nursing home. He testified that the decedent "had a moderately severe senility * * * she was not in contact with reality * * * she was disorientated much of the time, talked irrationally" (Tr. 82). He further testified that she was not capable of recognizing her relatives and did not know what property she owned. Dr. Huser testified that her condition would not improve but would gradually "get worse" (Tr. 83).

(E) The testimony of Dr. Huser as to the mental condition of the decedent must be given substantial weight. (See *American National Red Cross v. Gumberts*, 207 Okl 96, 247 P. 2d 735, 739.) All the medical evidence supported the contention that the decedent did not possess the testamentary capacity to make the will dated October 22, 1971, and said will should

be disapproved. (See *Williams v. Ben-night*, Vol. 43 OBJ 2861, October 24, 1972.)

8. (A) a prior will dated June 10, 1957, was submitted for probate. Under the terms of this will, the decedent devised a certain allotment to Wilma Red Bird, but the devise is ineffective for the reason that she did not own the allotment at the time of her death. The decedent made specific devises to Irene Red Bird Yellow Hawk, Bill Junior Red Bird, David Fan Man and the rest and residue of her estate she devised to Joe Red Bird.

(B) Rosa White Thunder, a witness to said will, testified that she was present with the decedent when she discussed the preparation of the will with James M. Hays, Jr., the scrivener who is now deceased. She further testified that the decedent requested her to witness the will and she identified her signature, and she testified that the decedent signed the will in her presence (Tr. 74). It is noted that attached to the will is a certificate showing that Rosa White Thunder acted as interpreter for the decedent in connection with the preparation of the will. In this connection, one witness testified that the decedent could not speak English (Tr. 48).

(C) Leo Dericksweller identified his signature as one of the attesting witnesses, but he did not have any recollection concerning the execution of the will (Tr. 69).

(D) Attached to the will dated June 10, 1957, are affidavits of the decedent, the attesting witnesses and the scrivener concerning the execution of the will. This is a "self proved" will. The fact that the evidence failed to establish that the two attesting witnesses did not sign the will in the presence of each other does not invalidate the will. 43 CFR 4.260(a) only requires that the will be "attested by two disinterested adult witness". A failure on the part of the decedent to request specifically that one act as a witness to her will does not constitute lack of due execution. (See *Estate of Annie Devereaux Howard*, IA-884, December 17, 1959.)

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The will dated June 10, 1957, should be approved.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 2 of the Act of June 25, 1910 (25 USC 373), and other applicable statutes, and pursuant to 43 CFR 4, *IT IS ORDERED* that the last will and testament dated October 22, 1971, be and the same is hereby disapproved, and *IT IS FURTHER ORDERED* that the will dated June 10, 1957, be and the same is hereby approved.

IT IS ORDERED that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with said will dated June 10, 1957, subject to payment of the probate fee and allowed claim as follows:

To Irene Red Bird Yellow Hawk Goodbear, Cheyenne Unallottee and devisee, the following:

An undivided $\frac{1}{2}$ interest in the allotment of Holy Woman Cheyenne #2054, described as the NW/4 Sec. 25-17N-13 W., I. M., in Oklahoma, containing 160 acres.

To David Fan Man, Sr., Cheyenne Unallottee and devisee, the following:

All of the allotment of Crow Neck, Cheyenne #2166, described as the SE/4 Sec. 34-19N-13 W., I. M., in Oklahoma, containing 160 acres.

To Bill Junior Red Bird, Cheyenne Unallottee and devisee, the following:

An undivided $\frac{1}{2}$ interest in the allotment of Hawk, Cheyenne #2053, described as Lots 1, 2, 3, 4, 5 and SW/4 NE/4 Sec. 25-17N-13 W., I. M., in Oklahoma, containing 139.48 acres more or less.

To Joe Red Bird, Cheyenne Unallottee and residuary beneficiary, all of the trust or restricted property listed in the inventory of the Concho Agency dated February 28, 1972, except Cheyenne Allotments 2053, 2054 and 2166, and all other trust or restricted property of the decedent not

otherwise disposed of under the terms of said will, if any there be.

IT IS FURTHER ORDERED that distribution of the estate to the devisees be stayed pending a ruling on the application of Donley & McMillin, Attorneys at Law, 113 N. Broadway, Weatherford, Oklahoma, for allowance of attorney fees, except for the payment of a claim hereinafter set forth.

The claim of Irvin Nicholson, Rockcliff Memorial, 638 North Sixth Street, Clinton, Oklahoma 73601, in the amount of \$375.95, covering the purchase of a grave marker, is hereby allowed and is to be paid from funds now held or accruing to the credit of the estate, subject to payment of the probate fee.

The trust or restricted estate of the decedent having been appraised at \$75,650.70, a probate fee of \$75.00 will be collected by the Superintendent or other officer in charge in accordance with the authority found in the Act of January 24, 1923 (25 USC 377).

Done at the City of Tulsa, Oklahoma, and dated January 19, 1973.

JOHN F. CURRAN,
Administrative Law Judge.

APPENDIX "B"

IN THE MATTER OF THE ESTATE OF: Irena (Irene) Crowneck Hawk, deceased Cheyenne Unallottee

PETITIONS FOR REHEARING DENIED

On March 15, 1973, Lena Abbie (Abie) Big Bear Yellow Eagle, an interested party, being the beneficiary under a purported will dated October 22, 1971, filed a petition for rehearing of the Order

Approving Will and Decreeing Distribution dated January 19, 1973.

The grounds for rehearing set forth in the petition are as follows:

1. Newly discovered evidence; and
2. That the testimony of Dr. John Huser is not complete and is inconsistent in that he testified that the decedent had an arteriosclerotic condition, but did not prescribe medication for that condition.

The petition for rehearing should be denied for the following reasons:

1. Attached to the petition are affidavits of Medicine Woman Big Nose and Lillie Armstrong who state that they visited with the decedent in August and September of 1971 and that she was mentally competent. The testimony of these persons on a rehearing would be merely cumulative testimony. Erma Gean Tsotaddle and Sarah Heap of Birds both testified at the hearing on November 1, 1972, that the decedent was competent during that period of time. (Tr. 42, 43, 48, 49.) It is a general rule of law that a new trial or rehearing will not be granted on grounds of newly discovered evidence if such evidence is only cumulative in nature. (See *Green v. Burns*, 204 Okla. 415, 230 P. 2d 892, 1951.)

2. The transcript is complete and accurate as to the testimony of Dr. John Huser. (Tr. 80-85) Dr. Huser testified that the decedent had a "generalized arteriosclerotic" condition. (Tr. 81) In answer to a question as to whether he prescribed medication for arteriosclerosis, Dr. Huser testified that, "No, so I may not have given her any, I didn't check the record that closely". (Tr. 84) The testimony of Dr. John Huser is clear, cogent and consistent as to the mental condition of the decedent.

Ester Waters (Black Wolf) also filed a petition for rehearing alleging that she was an heir at law and objecting to the will of the decedent for the reason that "she always writes her own name". The petition shows that she is a second cousin of the decedent. In the Order in this

case, it is determined that Nettie Black Tyler Starr, an aunt of the decedent, is the sole and only heir at law. Under Subsection 6, Section 213, Title 84, Oklahoma Statutes, 1971, Mrs. Starr is the next of kin and the sole heir of the decedent. (See *In Re Humphrey's Estate*, 141 P. 2d 993, Okl. 1943.)

As to the objection to the will, the decedent signed her name to the June 10, 1957 will which was approved. The petition of Ester Waters (Black Wolf) should be denied.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by the Act of June 25, 1910, as amended by the Act of February 14, 1913 (25 USC 372, 373), and other applicable statutes, and pursuant to 43 CFR 4.241 (b), IT IS ORDERED that the separate petitions for rehearing of Lena Abbie (Abie) Big Bear Yellow Eagle and Ester Waters (Black Wolf) be and the same are hereby denied.

Done at Tulsa, Oklahoma, this 8th day of May 1973.

JOHN F. CURRAN,
Administrative Law Judge.

DIEDRICH BROS. ET AL.

V.

BUREAU OF RECLAMATION

OHA 72-BR-1

Decided July 12, 1974

Appeal from a decision by an Assistant Regional Director, Bureau of Reclamation, canceling water rights.

Reversed and remanded.

Water and Water Rights: Reclamation Projects: True Consideration

The term "true consideration" in section 46 of the Omnibus Adjustment Act of 1926 means the actual benefit or detri-

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ment or combination thereof accepted by the holder of excess land as the inducement for an agreement to sell. 43 U.S.C. § 423(e) (1970).

Water and Water Rights: Reclamation Projects: Fraudulent Representation

To support a finding of "fraudulent representation," based upon a failure to disclose to the Government the "true consideration" for the sale of excess land, the evidence must clearly show that the alleged fraud feisor intended to deceive and that there was reliance upon such representation. 43 U.S.C. § 423(e) (1970).

Water and Water rights: Reclamation Projects: Residence Requirement

Where the record does not contain evidence or findings as to the residence of the holder of federal water rights, it will be remanded for completion. 43 U.S.C. § 481 (1970).

APPEARANCES: Ralph L. Cormany, Esq., for appellants Diedrich Bros. *et al.*, C. E. Van Atta, Esq., for appellants, Hogue *et al.*, and Richard J. Dauber, Esq., for appellee, Bureau of Reclamation.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR AD HOC BOARD OF APPEALS

By decision dated April 29, 1971, the Assistant Regional Director of the Bureau of Reclamation canceled the water rights appurtenant to certain contiguous parcels of land each of which is owned by a member of the appellant Diedrich family or

held in trust for his or her beneficial interest. His determination was based upon statutory authority granted to the Secretary of the Interior in section 46 of the Omnibus Adjustment Act of 1926, to impose a sanction for any " * * * fraudulent representation as to the true consideration * * *" involved in the sale of so-called "excess land," that is to say, " * * * irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres * * *" which receives deliveries of water from a federal reclamation project. 43 U.S.C. § 423(e) (1970).¹ Subsequently, the Diedrichs and their predecessors in title, Frank H. Hogue, Sharon Akers, and Valerie Cress (hereinafter, the Sellers) appealed to the Secretary, contending that the Assistant Regional Director's fraud determination was erroneous, and alternatively, that the Bureau should be estopped from claiming fraud under applicable Ninth Circuit precedents. For the reasons set forth hereafter, we conclude that although the appellants did not fully report the "true consideration," the alleged representation in dispute was not "fraudulent," as that term is used in the Act. Accordingly, we reverse the decision below and remand the case for further proceedings to complete the record.

¹ Act of May 25, 1926, 44 Stat. 649, as amended, 70 Stat. 524.

I.

*Factual and Procedural
Background*

The basic facts of this controversy are not in dispute. The lands in question receive Central Valley Project Water from the San Luis Water District. The District is able to deliver this water pursuant to a 1959 contract with the United States which incorporates restrictions on the sale of excess lands as provided in section 46 of the Omnibus Adjustment Act of 1926. (Exhibit A, Tab 1, Articles 20-I.) Among other things, that contract provided that water could be delivered to excess land only if the owner agreed to sell such lands under terms and conditions satisfactory to the Secretary, at prices which exclude the value attributable to the Project water. It further provided that upon proof of "fraudulent representation" as to the "true consideration" involved in the sale of excess lands receiving Project water, the United States was entitled to instruct the District by written notice to cease supplying water. These restrictions were in turn made explicitly applicable to the subject lands by the District in its water service "Agreement Pertaining to Sale of Excess Lands" with the Sellers, dated January 27, 1961. (Exhibit A, Tab 2.)

In March of 1965, J. Milton and Edwin Diedrich along with their wives made gifts to their respective children of certain pieces of property that they owned in Ventura County, California. (Exhibit A,

Tab 46.) Later that year, the Southern Pacific Railroad offered to purchase the Ventura County property, and by way of response the Diedrich brothers and their wives, acting for themselves and as agents for their children, decided to exchange their Ventura County property for the subject lands, located in Fresno County. The alleged purpose of this exchange was legal tax avoidance.

The exchange agreement is dated October 1965 and is signed by the Sellers, on the one hand, and J. Milton Diedrich, Ella Mae Diedrich (wife), Edwin J. Diedrich, and Margaret Diedrich (wife), on the other. In relevant part, the agreement provided that the Sellers would sell 1,100.22 acres of land for a total purchase price of \$990,198. It further provided that the land would be divided into two parcels, the larger of which consisted of 968 acres of excess land with the remainder, 128 acres, being non-excess land. The excess land was allocated a value of \$436,027.50 or approximately \$450 per acre, and the non-excess parcel was valued at \$554,170.50 or approximately \$4,300 per acre. The agreement contemplated an exchange of the subject lands and the 50.848 Ventura County acreage owned by Buyers, which would in turn be followed by a sale of the latter to the Southern Pacific Company for \$990,198. Finally, the parties expressly agreed that the Sellers would obtain the approval of the Bureau of Reclamation of the price allocated to the excess land, with the

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contract to terminate if such approval were not secured.

Pursuant to the exchange agreement, deeds conveying the excess land in parcels, each 160 acres or less, to members of the Diedrich family or their trustees, respectively, were executed on December 1, 1965, and then recorded on January 7, 1966.² Contemporaneous with the recording of the excess land deeds, a deed conveying undivided one-half interests in the 128 acre non-excess remainder to Edwin Diedrich and J. Milton Diedrich, respectively, was also recorded.

In conformity with their contractual obligation, the Sellers, through their attorney, sought the approval of the Bureau of Reclamation for the excess land purchase price. They filed with the Bureau's Tracy Field Division a legal description of all the lands involved in the exchange with the Diedrichs, including the parcel which contained non-excess land. (Exhibit A, Tab. 16.) On December 31, 1965, Mr. Eugene Cakin, chief of the Tracy Field Division, advised the Sellers that the sale was approved by the Regional Director, and on January 4, 1966, a formal memorandum was sent to the Sellers ad-

vising them of an approved purchase price of no more than \$532,400 or about \$550 per acre for the excess land. (Exhibit A, Tab. 23.) Subsequent to the recording of the deeds, both the Sellers and the Diedrich grantees executed statements concerning the excess land sale on official Bureau forms. These forms did not require any representation as to non-excess land which may have been involved in the sale of excess land. They only called for the "Total Sale Price" of the excess land, which was in fact accurately reported, rather than the "true consideration." (Exhibit A, Tabs 24-5.) The parties stipulated that the Bureau forms were revised in November 1969, and now require sales data concerning transfers of non-excess lands which are related and may be tied to sales of excess lands. (Tr. 25-26.)

From January of 1966 until February of 1971, the Bureau in no way even hinted to the parties that it had any second thoughts regarding the approval given the subject transaction. On February 1, 1971, after five years of silence, the Assistant Regional Solicitor advised the Sellers that the Regional Director had referred the case to his office for investigation and appropriate action. (Exhibit A, Tab. 29.) The discussion in that letter of the total purchase price of the excess and non-excess land clearly indicated that the Bureau had finally, if somewhat belatedly, appreciated and investigated the significance of the non-excess land involved in this

² The following were the grantees of the excess land, respectively, and are parties to this appeal: Bank of A. Levy, as trustee for Daniel Edward Diedrich, Bank of A. Levy, as trustee for William Walter Diedrich, Patricia Miller, John M. Diedrich, James J. Diedrich, Bank of A. Levy, as trustee for Mary Elizabeth Diedrich, Bank of A. Levy, as trustee for Ellen Louise Diedrich, Bank of A. Levy, as trustee for Robert Allen Diedrich, Ella Mae Diedrich, Margaret Diedrich, Edwin Joseph Diedrich, Sr., and Elinor Susan Neer.

transaction. Subsequently and presumably upon the recommendation of the Office of the Solicitor, the Assistant Regional Director issued his decision canceling the water rights. (Exhibit A, Tab 30.)

This case is before the Office of Hearings and Appeals (OHA) pursuant to 43 CFR 230.115-119. The Ad Hoc Board is constituted by the authority of the Director of OHA. 43 CFR 4.(1) (5).

By order of the Board, dated March 16, 1972, a fact finding hearing by an Administrative Law Judge was held in Fresno, California. The hearing took place on November 8, 1972, and the transcript of that proceeding, as well as the Judge's Recommended Decision and exceptions thereto, have been made a part of the record.

II.

Issue Presented on Appeal

Whether there is " * * proof of fraudulent representation as to the true consideration * * *" for the sale of the subject excess lands sufficient to authorize cancellation of the appurtenant water rights pursuant to section 46 of the Omnibus Adjustment Act of 1926.

III.

Discussion

In relevant part, section 46 of the Omnibus Adjustment Act of 1926 provided with respect to privately owned land:

* * * that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; * * * and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales * * *.

The resolution of this appeal turns upon the meaning of two undefined statutory terms, namely, "true consideration" and "fraudulent representation."

The parties to this appeal have all assumed that the construction of this statute is governed by the law of the State of California and on that basis have argued the state precedents on fraud. The only conceivable bases for applying state substantive doctrines would be an express provision requiring the application of the local body of law, or alternatively, the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.³ Since Congress did not expressly provide for the application of local substantive law and inasmuch as the *Erie* doctrine applies only to cases in federal courts where the basis of jurisdiction is diversity of citizenship, we cannot agree that state law applies. We draw support for this con-

³ In *Erie Railroad Co. v. Tompkins*, *supra*, the United States Supreme Court held that in cases where the sole basis of federal jurisdiction is diversity of citizenship, the federal courts must apply the substantive law of the State.

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clusion from the additional fact that a contrary holding would be likely to lead to inconsistent results on sets of facts which are significantly distinguishable only with respect to the situs. We do not believe that Congress intended to enact such a capricious policy or consciously decided to make the operation of the general reclamation law subject to the vagaries of the legislatures and courts of the various States.

Given the lack of express statutory definition of the terms "true consideration" and "fraudulent representation," we are of the opinion that the Congress deliberately left to the Secretary the task of investing those terms with meaning on a case-by-case basis in light of the apparent statutory objective of discouraging land monopolization and speculation by inhibiting holders of excess land from realizing the value of appurtenant water rights derived from federal reclamation projects. Apart from the bare words of the statute, the only available extrinsic authorities of any value as a guide for construction are the contemporaneous federal common law precedents to the extent that they are relevant and do not conflict with the statutory purpose.

Turning to the details of the case at hand, we have initially concluded that on the narrow facts of this record, the appellants did not report to the Secretary the "true consideration" involved in the subject sale. By "true consideration," we mean the *actual* benefit or detriment or combination thereof accepted by the

holder of excess land as the inducement for an agreement to sell excess land. The use of the word "true" necessarily implies that the Secretary's investigation is not restricted to the stated consideration and that he is authorized to pierce the veil of the agreement in order to enforce the Act.

Our conclusion that the stated consideration was not the "true consideration" rests upon three related aspects of the evidence. First, the provisions of the exchange agreement, that is, the contract of sale, make it abundantly clear that the promise which induced the Sellers to agree to part with the approximately 1,100 acres was an agreement to exchange their land for property in Ventura County worth about \$990,000. That figure works out to a price of approximately \$900 per acre for the subject Fresno property. (Tr. 114.) Paragraph two of the agreement reads in pertinent part; "Seller agrees to sell and Buyer agrees to buy said land pursuant to the terms of this agreement for a total purchase price of \$990,198 * * *." From that provision, we infer that the parties viewed the lands as one unit for the purpose of setting an overall price of \$900 per acre. (Tr. 98, 114.) Second, we are impressed by the dramatic disparity in the allocated prices of the excess and non-excess land. The latter was priced at about \$4,300 per acre while the former was listed at \$450 per acre, with the average significantly and coincidentally being \$900 per acre. Lastly,

there is the appraisal evidence by an entirely credible Government expert that the value per acre of the subject non-excess land, which reflects the appurtenant water rights, was about \$900 in 1965. (Tr. 78.) On the basis of these facts taken together, we find that the "true consideration" for the excess land sold in this case was \$900 per acre, part of which was reflected in the tie-in sale price of the non-excess land that was not reported by the appellants.

We recognize that the stated purchasers of the subject excess lands were for the most part separate from each other, as well as from the purchasers of the non-excess land, but we are not persuaded this matter of form makes any difference in arriving at the "true consideration." It is very plain on this record that the stated purchasers of non-excess land acted as agents for the other family members involved and that a portion of the consideration for the excess land was allocated to the non-excess parcel.

Having determined that the appellants did not fully disclose the facts of the sale and given that the appellants did report the fact that the transaction involved non-excess land, the remaining question is whether their silence with regard to the portion of the consideration for the excess land reflected in the sale price of the non-excess acreage constituted a "fraudulent representation" within the meaning of the Act.

The general principles with respect to cases of "fraudulent repre-

sentation" based upon silence were well-settled when the Omnibus Adjustment Act entered the statute books in 1926 and they provide a touchstone for this term of art from which we may determine what behavior the Congress intended to bring within the ambit of the statute. To support a finding of fraudulent representation at common law, the proponent was obliged to show by clear and convincing evidence that such representation involved a material fact, that it was false, that it was acted upon by another party, in ignorance of its falsity, upon a reasonable belief that it was true. *Farrar v. Churchill*, 135 U.S. 609 (1890). Silence could constitute a false representation if the alleged fraud feisor, with intent to deceive, suppressed a material fact which he was bound in good faith to disclose.⁴ The rationale for this holding was that such silence is in reality a representation that what is disclosed is the whole truth. *Stewart v. Wyoming Cattle Ranch Co.*, 128 U.S. 383 (1888); *Farrar v. Churchill*, *supra*. While a concealment of material facts designed to induce detrimental reliance was held fraudulent, not all such silences were actionable. Where the facts were equally avail-

⁴ There is a line of cases which hold alleged fraud feisors liable for misrepresentations, irrespective of any proof of an intent to defraud or deceive. Those cases were and are inapposite. They involve equitable claims where there is a breach of a fiduciary or confidential relationship or inequality of knowledge. See *Dooley v. Hadden*, 179 U.S. 646 (1901); *Brazee v. Morris*, 68 Ariz. 224, 204 P. 2d 475 (1949); *Hornaday v. First Nat'l Bank of Birmingham, Inc.*, 65 So. 2d 678 (1953); *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

able to parties dealing at arm's length and the supposed victim of the alleged fraud, having undertaken to investigate on his own, failed to discover the pertinent suppressed details, the courts concluded that there was no reliance and hence no fraud. *Cleveland v. Richardson*, 132 U.S. 318 (1889); *Farrar v. Churchill*, *supra*.⁵

As we noted earlier, the alleged misrepresentation in the instant case consists of the failure to report the sale price of the non-excess acreage and the concealment of the fact that the "true consideration" was the average price per acre of \$900. By way of defense, the appellants argue that they never intended to deceive the Bureau but sought only to comply with their minimum legal obligation. In support of this contention, appellants emphasize that the forms supplied by the Bureau, upon which sellers and buyers of excess land, respectively, reported details of the transfers, required no information whatsoever regarding any related sale of non-excess land or its price. Moreover, they add that, having voluntarily reported the associated sale of non-excess land, they can hardly be charged with concealing the relationship of the transaction or be responsible for the failure of the Bureau to seek further price information prior to issuing its formal approval in 1966.

⁵ These cases involved contracts between individuals while in the case at hand the victim of the alleged fraud is the Government and there are no formal direct contractual relations between the parties. The Board regards these distinctions as insignificant.

The Board is of the opinion that the appellants' argument is meritorious in two distinct respects. In the first place, we agree that, given the 1965 Bureau forms, which have since been revised, and the fact that the appellants filed a legal description of *all* the subject land, they had reason to believe that the Government had no interest in any further details of the sale and that they had fulfilled their obligations prerequisite to retention of the existing water rights. It is therefore the judgment of the Board that the evidence is insufficient to support a finding of an intent to deceive in view of the Bureau's responsibility to prevail by clear and convincing evidence. Second, the Board is agreed that the Bureau has made no showing of reasonable reliance. We have so concluded because the record indisputably shows that the agency knew of the tie-in nature of the sale, and in the course of the ensuing investigation prior to approval, there was no insurmountable bar inhibiting, or lack of opportunity to make, a timely discovery of the price of the subject non-excess land. Since the Bureau cannot sustain its allegation of "fraudulent representation," the decision of the Assistant Regional Director must be reversed.

Before closing, the Board notes that the record is barren of any evidence regarding residence of the appellant *Diedrichs et al.* 43 U.S.C. § 431 (1970); *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972); *cf.*

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, *reh. den.*, 358 U.S. 805 (1958). We therefore are remanding this case to the Sacramento Regional Director to complete the record in this respect and we request that he proceed expeditiously, in light of the time it has taken to process this litigation, so that the Department may bring this case to a final administrative conclusion.

ORDER

Wherefore, pursuant to the authority delegated to the Ad Hoc Board by the Secretary of the Interior (43 CFR 4.1(5)), the decision of the Assistant Regional Director in the above-entitled docket **IS REVERSED** and the case **IS REMANDED** for proceedings consistent with the foregoing opinion.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

BRUCE A. BURNS,
Alternate Administrative Judge.

ESTATE OF ISAAC WILLIAM ABDALLA (DECEASED UNALLOTTED YANKTON SIOUX, U-1505)

3 IBIA 21 Decided *July 16, 1974*

Petition to reopen.

Granted.

**375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

To avoid perpetuating a manifest injustice, a petition to reopen filed more than three years after the final determination of the heirs will be granted where compelling proof is shown that the delay was not occasioned by the lack of diligence on the part of the petitioning party.

APPEARANCES: Robert Lee (Abdalla) Picotte, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This matter comes properly before this Board on a petition to reopen, dated November 27, 1973, filed by Robert Lee (Abdalla) Picotte, hereinafter referred to as Petitioner, since more than three (3) years have elapsed following the Order Determining Heirs which became final on September 13, 1963.

The Petitioner sets forth the following reasons in support of his petition to reopen:

1. I was never informed, nor was I aware, of my father's death and subsequent probate hearing.

2. I have never resided on the Rosebud or Yankton Indian Reservations. At the time of the probate hearing, I was residing in Sonor, [sic] California.

3. The testimony given by Harriet Abdalla, sister of my father, failed to mention my existence as a living son and heir.

4. The reason that I am now requesting the reopening of this estate is that I was just recently advised by the Yankton Agency of my father's death and probate and of the omission of my name from the estate. This came about when I obtained my birth certificate, which is enclosed and submitted for the Yankton

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Agency's use as evidence to support my claim and for enrollment into the tribe.

5. For clarification, I use the name of my step-father, John A. Picotte, Sr. My mother, now deceased, married John A. Picotte, Sr., when I was an infant. I do not know the whereabouts of my step-father. All my attempts to locate him have been unsuccessful.

6. Since I am the son of Isaac William Abdalla and was not included as an heir to his estate, I do hereby request that the estate be reopened in order that I may rightfully share in my father's estate.

Good and sufficient cause appearing, the petition to reopen should be granted and the matter remanded to the appropriate Administrative Law Judge for further proceedings and disposition.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the estate of Isaac William Abdalla, Unallotted Yankton Sioux, deceased, is **HEREBY RE-OPENED** and the matter is hereby **REMANDED** to the Administrative Law Judge with authority to conduct, after due notice to all parties in interest, whatever proceedings he deems necessary in the matter and for the issuance of an appropriate order consistent with the evidence adduced therein subject to the right of appeal by any aggrieved party.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

CLINCHFIELD COAL COMPANY

3 IBMA 247 Decided July 16, 1974

Appeal of Clinchfield Coal Company (Clinchfield) from a decision by an Administrative Law Judge (Docket No. 73-208-P), dated March 28, 1974, assessing monetary penalties in the amount of \$3,660 for 20 violations in its Lambert Fork Mine pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Evidence

In a default penalty assessment proceeding a party will not be heard on appeal to challenge evidence it could have challenged or rebutted at the hearing stage.

APPEARANCES: Raymond E. Davis, Esq., for appellant, Clinchfield Coal Company. The Mining Enforcement and Safety Administration did not participate in this appeal.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
ROGERS*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

*Factual and Procedural
Background*

On May 23, 1973, the Mining Enforcement and Safety Administration (MESA) filed a Petition for Assessment of Civil Penalty

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

against Clinchfield Coal Company (Clinchfield) alleging 20 violations of the Federal Coal Mine Health and Safety Act of 1969 (Act). Clinchfield did not file an answer, nor did it reply to an order issued July 16, 1973, by an Administrative Law Judge (Judge), to show cause why it should not be held in default and the matter disposed of in accordance with 43 CFR 4.544. On August 9, 1973, MESA was requested by the Judge to furnish all available information, including proposed findings concerning the six statutory criteria of section 109 (a) of the Act to be considered in assessing appropriate penalties. MESA submitted such proposed findings on October 16, 1973, which included these statements: "History: Number of violations previous 24 months 246;" and under the heading "History of Previous Violations"—"Two hundred forty-six violations have been issued to the operator in the preceding twenty-four months."

In his decision, issued March 28, 1974, the Judge adopted the proposed findings of fact and conclusions of law as submitted. In assessing penalties for the violations he took into account the fact that Clinchfield had been cited for 246 violations of the Act in the preceding 24 months.

Issue Presented

Whether the Judge erred in giving any weight to the "History of

Previous Violations" finding of fact as submitted by MESA.

Discussion

As a result of Clinchfield's failure to answer MESA's Petition for Assessment and the Judge's show cause order, the Judge properly disposed of this case pursuant to 43 CFR 4.544 and 43 CFR 4.545.

In determining the penalties to be assessed under section 109(a) of the Act, the Judge is required to take into account the six statutory criteria therein. To assist him, the Judge requested MESA to submit all available information concerning these criteria, which MESA did in the form of proposed findings. These proposed findings included the statement that 246 violations had been issued to Clinchfield at this mine in the preceding 24 months. The Judge in his decision, accepted this statement as evidence of Clinchfield's history of previous violations. In its brief, Clinchfield contends that the Judge should not have considered the evidence of previous violations submitted by MESA, as it alleges that the evidence consisted only of *notices* of violation, not *proved* violations. However, on its face the evidence refers to *violations* and not to *notices*.

The record is clear that Clinchfield had notice of the proceeding below and ample opportunity to contest the evidence submitted by

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MESA and to introduce evidence to rebut it. Since Clinchfield is deemed to have waived its right to hearing under 43 CFR 4.544,² it will not now be heard to dispute the Judge's findings of fact.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the order in the above-captioned case IS AFFIRMED. IT IS FURTHER ORDERED that Clinchfield Coal Company pay a total assessment of \$3,660 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

² 43 CFR 4.544, Summary disposition.

"(a) *Failure to answer.*—Where the respondent fails to file a timely answer to the Mining Enforcement and Safety Administration's petition for assessment of civil penalty, the Office of Hearings and Appeals will issue an order to show cause why the respondent should not be held in default. If the order to show cause is not satisfied as provided in the order, the respondent will be deemed to have waived his right to hearing and the administrative law judge may assume for purposes of assessment: (1) That each violation listed in the petition occurred; and (2) the truth of any fact alleged in any order or notice concerning such violation." * * *

JESSE HIGGINS, PAUL GOWER
AND WILLIAM GIPSON v. OLD
BEN COAL CORPORATION

3 IBMA 237 Decided July 16, 1974

Applicant-Petitioners, Jesse Higgins, Paul Gower and William Gipson filed separate Applications for Review of acts of discrimination. By agreement of the parties the Applications were consolidated into a single action.¹ Pursuant to section 4.515, Subpart F, Title 43 CFR, the Petitioners waived an evidentiary hearing and the issuance of an initial decision since they entered into a stipulation that there were no material issues of fact. However, there are legal issues requiring adjudication. Accordingly, the Administrative Law Judge referred the consolidated Applications to this Board for decision.

Federal Coal Mine Health and Safety
Act of 1969: Entitlement of Miners:
Discrimination

Jurisdiction over allegations of discrimination based on pneumoconiosis rests with the Secretary of Labor, not the Secretary of the Interior, under section 428 of the Act.

APPEARANCES: J. Davitt McAteer, Esq., for Jesse Higgins, Paul Gower and William Gipson (applicant-petitioners); Fred Blackwell, Esq., and Robert A. Meyer, Esq., for respondent, Old Ben Coal Corporation; and Guy

¹ Docket Nos. VINC 73-254, 73-255, 73-256.

Farmer, Esq., Bituminous Coal Operators' Association (*Amicus Curiae*).

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background Statement

The pertinent paragraphs of the stipulation of facts entered into by the parties read as follows:²

[1] The Petitioners and Respondent agreed that there are no controverted facts herein and that the herein Application should be granted, or denied, or dismissed on the herein below stipulation of facts.

[2] Respondent is a signatory to the National Bituminous Coal Wage Agreement of 1971, effective November 12, 1971, which is the collective bargaining agreement between the International Union, United Mine Workers of America and various coal companies throughout the United States, and which provides, *inter alia*, wage scales for various job classification in coal mines and certain conditions of employment. Each Petitioner is a member of Local Union 1345, which is located in the territorial area designated as District 12, International Union, United Mine Workers of America.

[3] Each Petitioner, after being employed by Respondent for a period of time, became entitled to the right to transfer from one job to another by virtue of Section 203 of the said Coal Act of 1969 [Federal Coal Mine Health and Safety Act of 1969], 30 U.S.C.A. 843, and Regulations implementary thereof. (30 CFR Part 90, Section 90.1 through 90.40.) Each Petitioner advised Respondent of his intent to exercise his right to said transfer and the Respondent advised

each Petitioner that he would be transferred from his then regular position to another position at the same rate of pay received by him immediately prior to the date of transfer. Each Petitioner did in fact make said transfer and, in each instance, the Petitioner was paid the wage rate received by him immediately prior to said transfer; the position to which the Petitioner transferred paid a lower wage rate than his previous position.

[4] Effective January 31, 1972, Petitioner Jesse Higgins transferred from the position of Machine Operator (rate of pay \$41.50 per day) to the position of Tracklayer (rate of pay \$37.25 per day). Effective November 12, 1972, as called for by the National Bituminous Coal Wage Agreement, the rate of pay for a Machine Operator was increased from \$41.50 to \$45.75 per day, and the rate of pay for a Tracklayer was increased from \$37.25 to \$40.00 per day. From the date of Petitioner's transfer and afterwards the Respondent has continued to pay said Petitioner the rate of pay applicable to the position of Machine Operator immediately prior to the date of Petitioner's transfer to the position of Tracklayer.

[5] Petitioner Higgins has requested Respondent to pay him at the rate of pay which became applicable to the position of Machine Operator on November 12, 1972, namely, \$45.75 on the ground that such is required by the provisions of the Coal Act cited in paragraph [3] hereinabove. Respondent has declined and refused to pay the rate requested by said Petitioner and has continued to pay said Petitioner for his work as Tracklayer at the same rate of pay received by him immediately prior to his transfer, namely, \$41.50 per day.

[6] Effective January 31, 1972, Petitioner Paul Gower transferred from the position of Miner Operator (\$41.50 per day) to the position of Tracklayer (\$37.25 per day). Effective November 12, 1972, as called for by said Wage Agreement, the rate of pay for a Miner Operator was increased from \$41.50 to \$45.75 per day, and the rate of pay for a Tracklayer was

² For convenience, the numbering of the paragraphs is that of the Board.

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July 16, 1974.

increased from \$37.25 to \$40.00 per day. From the date of Petitioner's transfer, and afterwards the Respondent has continued to pay said Petitioner the rate of pay applicable to the position of Miner Operator immediately prior to the date of Petitioner's transfer to the position of Tracklayer.

[7] Petitioner Gower has requested Respondent to pay him at the rate of pay which became applicable to the position of Machine Operator [sic] on November 12, 1972, namely, \$45.75 per day, on the ground that such is required by the Coal Act provisions cited in paragraph [3] hereinabove. Respondent has declined and refused to pay the rate requested by said Petitioner and has continued to pay Petitioner for his work as Tracklayer the same rate of pay received by him immediately prior to his transfer, namely, \$41.50 per day.

[8] Some time after May 8, 1972, Petitioner William Gipson transferred from the position of Repairman (\$41.50 per day) to the position of Bottom Laborer (\$37.25 per day). Effective November 12, 1972, as called for by the said Wage Agreement, the rate of pay for a Repairman was increased from \$41.50 to \$45.75 per day, and the rate of pay for a Bottom Laborer was increased from \$37.25 per day to \$40.00 per day. From the date of Petitioner's transfer and afterwards the Respondent has continued to pay said Petitioner the rate of pay applicable to the position of Repairman immediately prior to the date of Petitioner's transfer to the position of Tracklayer [sic].

[9] Petitioner Gipson has requested Respondent to pay him at the rate of pay which became applicable to the position of Repairman on November 12, 1972, namely, \$45.75, on the ground that such is required by the Coal Act provisions cited in paragraph [3] hereinabove. Respondent has declined and refused to pay the rate requested by said Petitioner and has continued to pay said Petitioner for

his work as Bottom Laborer at the same rate of pay received by him immediately prior to his transfer, namely, \$41.50 per day.

Contentions of the Parties

Applicant-Petitioners in their request for Consolidation of Application contend that the jurisdiction of the Office of Hearings and Appeals, and this Board, is based upon sections 110(b), 203, and 428 of the Federal Coal Mine Health and Safety Act of 1969 (Act).³ They further contend that they are being discriminated against because they are suffering from pneumoconiosis (black lung). They predicate this upon the fact that at the time of their voluntary transfer to the new positions they were earning \$41.50 per day and continue to earn that daily rate although subsequent to their respective transfers, the wage rate for the positions from which they transferred was increased to \$45.75 per day pursuant to the National Bituminous Coal Wage Agreement of 1971, *supra*. They claim the failure of management to increase their daily rate in their new positions to \$45.75 is discriminatory under the Act since it is a result of their suffering from pneumoconiosis. They further contend that:

Respondent's actions constitutes [sic] a breach of the National Bituminous Coal Wage Agreement of 1971 and thereby discriminate against the Applicant-Petitioners.

³ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Counsel for both Old Ben Coal Corporation (Respondent) and Bituminous Coal Operators' Association (BCOA) urge lack of jurisdiction either in the Secretary of the Interior or this Board to consider the instant Applications for Review of the alleged acts of discrimination. In support of their contention that the Board lacks jurisdiction they argue that the issue is solely one arising and governed under a contract between the parties and that questions of discrimination, if such there are, should be answered by arbitration as provided in the contract, and that, therefore, this Board has no jurisdiction to adjudicate such purely contractual disputes between the parties. BCOA specifically urges that neither section 110(b) nor sections 203 and 428 of the Act are applicable in this case and that those sections confer no jurisdiction in the Secretary of the Interior or this Board under the circumstances here involved.

Issue Presented

Whether the Board has jurisdiction over the subject matter of this proceeding.

Discussion

In their stipulation as to the factual background of this proceeding both petitioners and respondent agreed that jurisdiction of this Board is based upon sections 110(b), 203, and 428 of the Act. We take this to mean only that *if* juris-

diction lies it must be based on one or more of these sections and was not an attempt to confer jurisdiction by agreement where none exists. (BCOA was not a party to that agreement.) It is, of course, well settled that a trial court or an appellate court cannot consider the merits of a case until a determination of jurisdiction is made. Jurisdiction cannot be vested, where it does not exist, by stipulation of the parties. *Baker v. Riss & Co., Inc.*, 444 F.2d 257, 259 (8th Cir. 1971.) For reasons which follow it is our view that we have no jurisdiction over this controversy.

The gravamen of the case before us is that the complainants have been discriminated against by reason of the fact that they suffer from pneumoconiosis. Complainants rely upon the provisions of subsections 203 (b) (1) and (3) of the Act (30 U.S.C. § 843(b) (1) and (3)) in support of their claim.

Section 203 in general sets forth standards for medical examinations and tests for miners and in pertinent part provides that a miner suffering from pneumoconiosis be afforded the option of transferring to another position in the mine for such period as may be necessary to prevent further development of the disease, and further provides that such miner " * * * shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer." Section 203 does not provide any procedure for review, so we must look elsewhere.

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Section 428(a) of the Act (30 U.S.C. § 938), *as amended* by the Black Lung Benefits Act of 1972,⁴ specifically provides that "[n]o operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis * * *." In pertinent part subsection (b) of section 428 provides as follows:

Any miner who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, * * * may * * * apply to the Secretary for a review of such alleged discharge or discrimination.

Section 402(c) of the Act defines the term "Secretary" when used in Part C (Title IV) thereof, as the *Secretary of Labor*. Since section 428 is contained in Part C of Title IV of the Act, *as amended*, and since complainants allege discrimination by reason of their suffering from pneumoconiosis, we must conclude that Congress clearly conferred jurisdiction over such complaints upon the Secretary of Labor.

We believe that statutory construction would dictate that where jurisdiction is expressly conferred upon one government official it is denied to any other, unless otherwise specifically provided, and for that reason we decline to exercise jurisdiction over this proceeding

since this Board acts solely as the review arm of the Secretary of the Interior. Furthermore, since there is specific statutory provision for review of discharge and/or discrimination of a miner based upon the fact that such miner suffers from pneumoconiosis, as here alleged, we need not speculate whether, in the absence of such provision, this Board could or should assume jurisdiction under some other provision of the Act, specifically section 110(b). We think it highly unlikely that Congress intended to confer jurisdiction upon both the Secretary of Labor and the Secretary of the Interior pertaining to the same subject matter within the confines of the same Act.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the above-referenced Applications for Review of acts of discrimination submitted by applicant-petitioners, Jesse Higgins, Paul Gower and William Gipson ARE DISMISSED for lack of jurisdiction.

C. E. ROGERS, JR.

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

⁴ P.L. 92-303, 86 Stat. 150-157, 30 U.S.C. §§ 901-951 (1973).

OLD BEN COAL CORPORATION

3 IBMA 252

Decided July 16, 1974

Appeal by Old Ben Coal Corporation (Old Ben) from a decision by an Administrative Law Judge (Docket No. VINC 73-185), dated December 10, 1973, dismissing an Application for Review filed by Old Ben of an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

An accumulation of loose coal and coal dust in the presence of nonpermissible equipment will support an inspector's finding that an imminent danger situation exists.

APPEARANCES: G. Christopher Meyer, Esq., and Thomas A. Barnard, Esq., for appellant, Old Ben Coal Corporation. The Mining Enforcement and Safety Administration did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

*Factual and Procedural
Background*

On November 6, 1972, during an inspection by a Federal inspector, Old Ben Coal Corporation (Old

Ben) was issued *Order of Withdrawal No. 1 JMA, November 6, 1972* which stated:

Condition or Practice—Accumulations of loose coal and coal dust were present in rooms 27 and 28 of the 10, 11 and 12 north off the 16 east section. This loose coal and coal dust ranged in depths of from 4 to 18 inches in both rooms and was present from the conveyor belt inby to the faces of rooms 27 and 28, a distance of 140 feet in both rooms. Loose coal and coal dust were also present at the shuttle car dumping station in room 29 for a distance of 20 feet ranging in depth from 4 to 20 inches, and loose coal and coal dust were also present at the shuttle car dumping station at the conveyor belt tail piece section in depths ranging from 6 to 16 inches for a distance of 24 feet. A bolt was missing from the control panel of the No. 2138 shuttle car. The outer insulation of the trailing cable to the No. 1587 shuttle car had been damaged thus exposing the inner cables. Adequate belt isolation was not being achieved in that the metal stopping at the 750 feet mark of entry 10 (located between entries 10 and 11) had been damaged and partially knocked down.

The conditions cited were abated, and the Order of Withdrawal terminated on the same day it was issued.

Old Ben filed an Application for Review of this Order pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act), contending that the conditions cited did not constitute imminent danger because: (1) ventilation in the area involved was adequate at the time of the inspection; (2) no measurable amounts of methane were present; (3) the allegedly missing bolt did not impair "permissibility" of the shuttle car

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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as that term is defined in section 318 of the Act; (4) the damage to the trailing cable was a temporary splice made in compliance with 30 CFR 75.603; and (5) although there was improper belt isolation, the air passing through the belt entry did not reach the working face and did not create any condition of imminent danger.

At the hearing, the face foreman for Old Ben testified on cross examination that he did not know how long the bolt had been missing from the shuttle car, but that its absence made the car "nonpermissible" and a potential source of ignition. He also testified that although he did not measure the loose coal and coal dust cited, he believed them to be "normal spillage" rather than "accumulations." He further admitted that the damaged trailing cable was a potential source of ignition in its damaged condition. However, he concluded that he did not believe that any or all of the conditions cited in the Order constituted an imminent danger situation.

The inspector who issued the Order testified in pertinent part that: (1) based upon his measurements of the deposits of loose coal and coal dust, they were excessive accumulations; (2) due to the depth of these accumulations, the belt was running in contact with them, which he believed could cause friction and heat and might result in a belt fire; (3) there was a bolt missing from the shuttle car control panel which rendered the car nonpermissible; (4) although there were no bare

wires in the damaged trailing cable, the condition of the cable could cause an explosion in the cable and increased the possibility of a spark if the cable were run over or cut on a rib; and (5) with regard to the damaged stopping, in the event of a belt fire, he believed smoke would find its way up the escapeway. Based upon the foregoing, the inspector concluded that an imminent danger existed and therefore issued the section 104(a) Order.

In his decision the Administrative Law Judge (Judge) found in pertinent part that: (1) the Mining Enforcement and Safety Administration had established by a preponderance of the evidence that the conditions and practices cited in the Order existed at the time of its issuance; (2) although there may have been adequate ventilation and no measurable methane at the time of the inspection, Old Ben's mine is a gassy mine which could liberate methane at any time; (3) the nonpermissible shuttle car and damaged trailing cable were sources of ignition which in the presence of excessive accumulations of loose coal and coal dust and inadequate belt isolation were sufficient to support a conclusion that an imminent danger existed; (4) the inspector's permitting the damaged trailing cable to be vulcanized by use of a propane torch in the area closed by the Order did not vitiate the imminence of the danger because all required safety precautions were taken; and (5) Old Ben had failed to refute by a preponderance of the evidence that

the conditions and practices cited in the Order did not constitute an imminent danger. Accordingly, the Judge concluded that the Order of Withdrawal was properly issued and dismissed Old Ben's Application for Review.

Issue Presented

Whether the Judge erred in finding that the conditions cited in *Order of Withdrawal No. 1 JMA, November 6, 1972* constituted imminent danger.

Discussion

Having reviewed the record and considered the brief of Old Ben, the Board finds that Old Ben has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Judge should not be affirmed. The arguments made on appeal to the Board were fully and fairly considered by the Judge, and his decision is clearly supported by and is consistent with our decisions in *Eastern Associated Coal Corporation*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973), and *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide, par. 16,567 (1973).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY

ORDERED that the decision in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

LUCAS COAL COMPANY, ET AL.

3 IBMA 258

Decided July 16, 1974

Appeal by Lucas Coal Company, et al.¹ (appellants) from a decision by an Administrative Law Judge (Docket No. PITT 72-48), dated November 19, 1973, dismissing Applications for Review of 29 Notices of Violation issued to 13 separate operators under section 104(b) of the Federal Coal Mine Health and Safety Act of 1969.²

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

An Application for Review proceeding of section 104(b) Notices of Violation under section 105(a) of the Act should be summarily dismissed where the violations charged in the Notices have been totally abated prior to hearing.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

¹ 29 dockets were consolidated by the Judge under Docket No. PITT 72-48. See *Addendum* for complete listing of dockets.

² P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Bulldozers are included in the category of mobile equipment required to have backup alarms were unavailable, he has five of clear visibility to the rear.

Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Notice of Violation

Where the operator is unable to show by a preponderance of the evidence that backup alarms were unavailable, he has not borne his burden of proof.

Federal Coal Mine Health and Safety Act of 1969: Abatement: Time for Abatement

Where the operator contends that the time for abatement in Notices of Violation is unreasonable solely because the alleged violation did not occur, a finding of violation moots such contention where the violation has been abated.

APPEARANCES: Henry J. Wallace, Jr., Esq., and Leo M. Stepanian, Esq., for appellant, Lucas Coal Company, *et al.*; Robert W. Long, Esq., Associate Solicitor, J. Philip Smith, Esq., Assistant Solicitor, and John H. O'Donnell, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

*Factual and Procedural
Background*

Lucas Coal Company, *et al.*, operators of open-pit mines (appellants) received 25 Notices of Violation of 30 CFR 77.410, requiring

adequate automatic warning devices which give an audible alarm when certain types of mobile equipment are put in reverse.³ Appellants also received a number of other types of Notices of Violation, four of which are on appeal to this Board in addition to the above 25.⁴ Appellants filed Applications for Review, pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act), for each of the Notices received, and the Administrative Law Judge (Judge) consolidated all of them for hearing under Docket No. PITT 72-48. Such hearing was held on June 20-22, 1972, in Butler, Pennsylvania. The 29 dockets on appeal are the Applications for Review which the Judge dismissed in his decision issued November 19, 1973. In 12 of these 29 dockets, including the four non-alarm Notices,⁵ the Judge admitted in evidence at the hearing Notices of Abatement of the alleged violations. In the remaining 17 dockets the record does not reveal whether or not the alleged violations were abated. For this reason,

³ These 25 Notices are represented by Docket Nos. PITT 72-48, PITT 72-51, PITT 72-55, PITT 72-57, PITT 72-59, PITT 72-61, PITT 72-64, PITT 72-70, PITT 72-117, PITT 72-120, PITT 72-121, PITT 72-124, PITT 72-126, PITT 72-128, PITT 72-130, PITT 72-132, PITT 72-134, PITT 72-136, PITT 72-141, PITT 72-147, PITT 72-163, PITT 72-167, PITT 72-168, PITT 72-170 and PITT 72-196.

⁴ These four Notices are represented by Docket Nos. PITT 72-62, PITT 72-68, PITT 72-173, and PITT 72-176.

⁵ These 12 dockets consists of PITT 72-48, PITT 72-59, PITT 72-62, PITT 72-64, PITT 72-68, PITT 72-70, PITT 72-134, PITT 72-147, PITT 72-163, PITT 72-167, PITT 72-173, and PITT 72-176.

we shall assume that these 17 alleged violations were not abated.

A consolidated brief was filed with the Board by appellants contending that: (1) 30 CFR 77.410 does not apply to bulldozers used in surface mines; (2) the Mining Enforcement and Safety Administration (MESA), by administrative practice, excludes equipment, like bulldozers, which has clear visibility to the rear, from the application of 30 CFR 77.410; (3) it was not shown at the hearing that adequate warning devices are available for such equipment; and (4) since no violations were established, the time allowed for abatement is inherently unreasonable and the Notices should be vacated. The above contentions concerned only the back-up alarm Notices. The four other Notices are disposed of hereinafter by the Board without the necessity of considering their merits.

A reply brief was filed by MESA on January 16, 1974, which contended that the Judge's decision below was correct and should be affirmed.

Issues Presented

A. Whether the Judge erred in finding that 30 CFR 77.410 requires installation of warning devices on bulldozers.

B. Whether clear visibility to the rear precludes the application of 30 CFR 77.410 to equipment with such visibility.

C. Whether appellants established by a preponderance of the

evidence that automatic alarms were unavailable for such equipment.

D. Whether the Judge erred in finding that the time allowed for abatement was reasonable.

Discussion

It has been the position of the Board since our decision in *Reliable Coal Corporation*, 1 IBMA 50, 58, 78 I.D. 199, 203, CCH Employment Safety and Health Guide, par. 15,368 (1971), that, " * * * the scope of a review of notices issued pursuant to section 104(b) must relate to determination of a reasonable time for abatement. * * * [i]f, however, the violation has been timely abated, there no longer exists an issue appropriate for review under section 105(a)." Therefore, since 12 of the 29 Notices including the four non-alarm Notices were totally abated prior to hearing, these respective Applications for Review should have been summarily dismissed by the Judge under our holding in *Reliable*, *supra*.

MESA, in its brief, states that the parties entered into a stipulation whereby it agreed not to move for dismissal of those dockets wherein the alleged violations had been abated. Apparently, the Judge honored this stipulation although no written stipulation appears in the record. However that may be, it is clear that the parties cannot stipulate or agree to create jurisdiction in the actual absence thereof; and parties cannot agree to try a case where a justiciable issue does

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not exist. See *Baker v. Riss & Company*, 444 F.2d 257, 259 (8th Cir., 1971). Therefore, the only Notices of Violation still to be considered are those concerning back-up alarms.

Having reviewed the record and considered the briefs of appellants and MESA, the Board finds that appellants have not demonstrated any reasons why the findings of fact, conclusions of law, and decision of the Judge should not be affirmed as to these Notices. We believe the portion of the Judge's opinion excerpted below⁶ accurately reflects our conclusions regarding the applications of 30 CFR 77.410 to the facts in these cases.

'Back-up Alarms

The [25] proceedings in Docket Nos. PITT 72-48, 72-51, 72-55, 72-57, 72-59, 72-61, 72-64, 72-70, 72-117, 72-120, 72-121, 72-124, 72-126, 72-128, 72-130, 72-132, 72-134, 72-136, 72-141, 72-147, 72-163, 72-167, 72-168, 72-170 and 72-196 all concern the application of 30 CFR § 77.410 to mobile equipment utilized in or in connection with open pit [sic] bituminous coal mining.

[A.] Applicants contend that bulldozers (which are cited in most of the § 77.410 notices) are not covered by this regulation. Applicants submit that § 77.410 by its wording applies only to "mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders"; that since the words "such as" require "similarity" or "like kind," bulldozers are not included because they are not "similar" to "trucks, forklifts, front-end loaders, tractors and graders" with respect to the element of hazard involved

and with respect to speed, weight and function. Further support is sought to be drawn from the fact that, unlike § 77.410, bulldozers are specifically mentioned in 30 CFR § 77.403, regarding canopies and roll protection.

Applicants' contentions are unpersuasive. The words "such as" do not indicate an inclusive characterization of all equipment affected by the regulation. Rather, they signify the use of examples by which a broad category may be recognized and clarified. Hence, mobile equipment other than the several examples of machinery specified in § 77.410 may be found to be within the coverage of this regulation.

Even assuming that the examples in the regulation are comprehensive, Applicants' argument that bulldozers are unlike the equipment named is incorrect. The regulation specifically applies to "tractors" and a bulldozer is commonly defined as a type of tractor.⁷ In addition, Applicants' analogy to the section of the regulation requiring canopies and roll protection does not lend support to their position since that provision (§ 77.403), by specifying bulldozers, is simply limiting the kinds of tractors which are affected more narrowly than those under § 77.410. Consequently, it is concluded that § 77.410 applies to bulldozers.

The Applicants have also challenged the back-up alarm standard in § 77.410 on due process grounds, contending that the standard as applied to mobile equipment in strip mining is inherently unreasonable, and further that no opportunity was provided to challenge the reasonableness of the regulation.

⁷ See: Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* (1968 ed.): "bulldozer. a. A tractor on the front end of which is mounted, a vertically curved steel blade held at a fixed distance by arms secured on a pivot or shaft near the horizontal center of the tractor"; cf. *Webster's Seventh New Collegiate Dictionary* (1969 ed.): "a tractor-driven machine having a broad blunt horizontal blade or ram for clearing land, road building, or comparable activities." (Italics added.)

⁶ *Lucas Coal Company, et al.*, Docket No. PITT 72-48 (November 19, 1973) (Fauver, W., A.L.J.).

It is to be observed, first, that the public record of the rulemaking process for § 77.410 shows that the Department of the Interior followed the "notice and comment" procedure in the promulgation of this regulation. Thus, in accordance with the Act, 30 U.S.C. § 801, the proposed Part 77 was announced in the Federal Register on December 19, 1970,⁸ and interested persons were invited to submit written comments, suggestions or objections to the Director of the Bureau of Mines within 45 days of the announcement. Four parties commented on proposed Section 77.410, including the Washington Irrigation and Development Company, the Williamson Shaft Contracting Company, and the North Dakota Workmen's Compensation Board. The Secretary of the Interior reported that, in all, 26 associations, companies, and individuals submitted comments, suggestions or objections pertaining to the proposed Part 77. On May 22, 1971, the regulations were promulgated, to take effect on July 1, 1971.⁹ Applicants were thus afforded an opportunity to utilize this procedure but apparently failed to do so.

The rulemaking procedure was not the only alternative for the applicants to challenge the strip mining regulations. The Federal Coal Mine Health and Safety Act also provides a method by which application of safety standards promulgated under the Act may be modified if circumstances so warrant. Section 301(c) provides that, upon petition of an operator or representatives of miners, the Secretary may modify the application of a safety standard in the case of a mine (or mines) where its application will diminish the safety of miners, or where there exists an alternative method of achieving the result of such standard without reducing the measure of safety protection afforded by the standard. This provision has not been utilized by the Applicants in challenging the strip mining regulations. It is therefore concluded that

the Applicants have failed to show a denial of procedural due process.

The Applicants attack the application of the back-up alarm standard to their industry generally, claiming that the alarms are unnecessary and would not materially aid the safety of the miners. Support for this position is sought in the testimony adduced at the hearing regarding the open space of strip mines, the absence of injury without the use of such alarms, the scarcity of miners working near vehicles used in strip mining and the fact that visitors on the job are rare and are not encouraged by the operators.

[B.] It is also contended, in particular, that the regulation could not have been intended to apply to bulldozers. The constant backward and forward movement of the dozer, its slow movement (usually no more than 3 miles per hour) and its clear visibility to the rear, the Applicants contend, are factors showing that the regulation was not meant to apply to such equipment.

[C.] The Applicants further contend that, in any event, "adequate" back-up alarms within the meaning of § 77.410 cannot be obtained for any of the vehicles involved in these proceedings, for the following basic reasons: The alarms do not hold up when installed on the equipment. Because the sound of the back-up alarms must carry above the noise of the vehicles, it is highly irritating and would probably violate the maximum noise level established under the Occupational Safety and Health Act of 1970. Consequently, the use of such alarms would subject the Applicant to Federal penalties under OSHA, and injunction suits by nearby towns and residents with possible claims for damages and even criminal liability.

After careful consideration of the record and the able briefs of counsel, it is concluded that the evidence shows neither arbitrary application of § 77.410 to the vehicles at Applicants' mines nor a lack of feasibility to equip such vehicles to comply with the standard.

⁸ 35 F.R. 19298.

⁹ 36 F.R. 9364.

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During the course of the hearing, the undersigned Judge made a site view of the Mathieson Strip Mine on motion of the Applicants, and specifically observed the following equipment which is, and was, representative of the vehicles at all of the mines involved in these proceedings: an Allis-Chalmers Model HD 2 bulldozer, a Euclid Model 72-51 front-end loader with a 5 cubic yard bucket, a Model D-9 Caterpillar bulldozer, and a converted flat bed fuel truck (a one and a half ton truck converted to a 500 gallon fuel truck). Rear and forward visual observation was made of each vehicle from the operator's seat to determine the normal scope of vision from that position. The bulldozers and the front-end loader were each equipped with a back-up alarm which was also carefully observed both as to its position, method of installation, and its sound in actual operation. As a result of these detailed views, it is found that, as regards both a bulldozer and front-end loader, a man of average height standing behind such equipment a distance of about 3 feet cannot be seen by the operator of such equipment. The fuel truck (the rear window of which is necessarily partially obstructed by the fuel tank) presents a comparable problem of rear vision for the driver. In addition, when a bulldozer, front-end loader or a truck is working on or near the crest of a hilly spot in the mine, the area of visual obstruction to the rear is markedly enlarged depending on the angle of incline. The evidence at the hearing also showed that there are various occasions in the routine operation of a strip mine when employees could be endangered by the back-up movement of such equipment.

[D.] The evidence does not show that adequate automatic back-up alarms are unavailable. It was established that there are several manufacturers of such alarms serving the Western Pennsylvania area, including Beckwith, Maxima, and Brinkley Companies. The cost of these units is about \$65 to \$100, with about 4 hours required for installation. Although the Applicants presented testi-

mony relating to the difficulty of back-up alarm maintenance or repair, the units come with a manufacturer's or dealer's warranty and can be successfully used.

As to the other objections posed by the Applicants, a serious problem of ripeness of the issues is apparent. A common thread runs throughout Applicants' complaints in showing problems which must be construed as merely hypothetical. This includes possible local injunctions, private damage suits and charges of violations of other laws that might result from the use of back-up alarms. Suffice it to say that if such matters should arise in connection with this standard specific issues can be developed on an appropriate record by a petition for modification under Section 301(c) of the Act.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ADDENDUM

Lucas Coal Company; Docket Nos.
PITT 72-48, PITT 72-173.

Sunbeam Coal Corporation; Docket
No. PITT 72-51.

Perry-Ross Coal Company; Docket
Nos. PITT 72-55, PITT 72-57,
PITT 72-176.

Grant R. Wright Coal Company;
Docket No. PITT 72-59.

Willowbrook Mining Company;
Docket Nos. PITT 72-61, PITT
72-62.

Theodore Demarsh Coal Company;
Docket No. PITT 72-64.

Miller and McKnight Coal Com-
pany; Docket Nos. PITT 72-68,
PITT 72-70.

C & K Coal Company; Docket Nos.
PITT 72-117, PITT 72-120,
PITT 72-121, PITT 72-124,
PITT 72-126, PITT 72-128,
PITT 72-130, PITT 72-132,
PITT 72-134, PITT 72-136.

West Freedom Mining Corpora-
tion; Docket Nos. PITT 72-141,
PITT 72-196.

Black Fox Mining & Development
Corp; Docket No. PITT 72-147.

AH-RS Coal Corporation; Docket
No. PITT 72-163.

W. A. Cotterman Coal Company;
Docket No. PITT 72-167.

Kerry Coal Company; Docket
Nos. PITT 72-168, PITT 72-
170.

OLD BEN COAL CORPORATION

3 IBMA 271 Decided *July 19, 1974*

Appeal by Old Ben Coal Corporation (Old Ben) from a decision by an Administrative Law Judge (Docket No. VINC 73-160), dated December 10, 1973, dismissing an Application for Review filed by Old Ben seeking review of an Order of Withdrawal issued pursuant to section 104(a) of the Fed-

eral Coal Mine Health and Safety Act of 1969¹ hereinafter "the Act."

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Accumulations of loose coal and coal dust together with sources of potential ignition will support a finding of imminent danger.

APPEARANCES: G. Christopher Meyer, Esq., for appellant, Old Ben Coal Corporation. The Mining Enforcement and Safety Administration did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On October 4, 1972, as a result of a two hour inspection, Old Ben Coal Corporation (Old Ben) received *Order of Withdrawal No. 1 MK, October 4, 1972* which stated:

Condition or practice. Accumulations of loose coal and coal dust were present along the ribs and floors starting from the 1550-foot station to inby room 38, ranging from 3 to 15 inches in depth for a distance of 67 feet, and from the tail sections to inby the tail sections for a distance of 165 feet including all cross-cuts ranging from 3 to 10 inches in depth. Rock dust was inadequate from the mouth of rooms 37 and 38 for a distance of 50 feet in room 38. Rock dust was in-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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adequate from the tail section to inby for a distance of 165 feet including all crosscuts. The 31 south haulage road was inadequately rockdusted for a distance of 1350 feet in the 31, 32 and 33 South sections off the 6 main east entries.

Two portable oil cans did not have caps to enclose the containers in the 31, 32 and 33 south section off the 6 main east entries. Five dust samples were taken to substantiate the findings.

The alleged conditions or practices were abated and the Order of Withdrawal was terminated the following morning.

Old Ben filed an application for review of the order contending that the conditions or practices cited did not constitute imminent danger as defined in section 3(j) of the Act.

At the hearing, the assistant safety director for Old Ben testified that there were "normal deposits" of loose coal in the area cited. He stated that he believed that they resulted from spillage from the belt, not accumulations. He also stated that ventilation in the area was very good and that, at the time of the inspection, there were no permissibility violations and very little methane. (Tr. 5-43.) At the time of the inspection, a front-end loader was operating, cleaning up the loose coal.

The federal inspector who issued the order testified that he believed the accumulations constituted an imminent danger inasmuch as they constituted a fire or explosion hazard. In his opinion all that was needed was an ignition and a fire could result. He stated that the

trailing cables and energized permissibility equipment, as well as the tail piece of the belt running in coal accumulations could be sources of ignition in the event of a roof fall, or other occurrence. Although conceding that these potential sources of ignition were not hazardous at the time of the inspection, he thought the possibility of danger so great that he closed the area until the accumulations which could propagate a fire or explosion were cleaned up. The inspector further stated that he believed the tail piece running in coal dust accumulations was a potential source of ignition in that it could heat up from such contact, although it was not hot at the time of the inspection. He concluded that if normal mining operations were allowed to continue before the accumulations were cleaned up and the area rockdusted, serious physical harm or death could reasonably have resulted. (Tr. 73-101.) Therefore, he issued the Order of Withdrawal.

In his opinion, the Administrative Law Judge (Judge) found that the inspector's findings as to the loose coal and coal dust accumulations were supported by the record. Further, he found that the energized equipment and the belt tail piece were ignition sources. Based upon the foregoing, the Judge concluded that the conditions cited constituted an imminent danger and that the subject Order was properly issued. Therefore, since Old Ben had failed to meet its burden of establishing that the condi-

tions cited in the Order did not constitute an imminent danger, the Judge dismissed Old Ben's Application for Review.

No testimony was given concerning the uncapped oil cans, and the Judge, as does the Board, did not consider this condition, in determining whether imminent danger existed.

Issue Presented

Whether the Judge erred in finding that the conditions cited in *Order of Withdrawal No. 1 MK, October 4, 1972*, constituted an imminent danger.

Discussion

Having reviewed the record and considered the brief of Old Ben, the Board finds that Old Ben has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Judge should not be affirmed. The arguments made on appeal to the Board were fully and fairly considered by the Judge, and his decision is clearly supported by and is consistent with our decision in *Eastern Associated Coal Corporation*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY

ORDERED that the decision in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR

DAVID DOANE,
Administrative Judge.

OLD BEN COAL CORPORATION

3 IBMA 277 Decided July 19, 1974

Appeal by Old Ben Coal Corporation (Old Ben) from a decision by an Administrative Law Judge (Docket No. VINC 73-175), dated December 10, 1973, dismissing an Application for Review filed by Old Ben of an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969,¹ hereinafter "the Act."

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Accumulations of loose coal and coal dust together with sources of potential ignition will support a finding of imminent danger.

APPEARANCES: G. Christopher Meyer, Esq., for appellant, Old Ben Coal Corporation. The Mining Enforcement and Safety Administration did not participate in this appeal.

¹P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

*Factual and Procedural
Background*

On November 1, 1972, during an inspection by a Federal inspector, Old Ben Coal Corporation (Old Ben) received *Order of Withdrawal No. 1 JMA, November 1, 1972*, which stated:

Condition or Practice—In the 34, 35 and 36 south of the 6 main east section, loose coal and coal dust was present in the No. 34 entry from the 70 feet mark inby for a distance of 500 feet in depths ranging from 4 to 18 inches, in the No. 35 entry from the shuttle car dumping point inby for a distance of 150 feet in depths ranging from 4 to 20 inches and in all cross-cuts located between entries 34 and 35.

In addition, the outer insulation of the trailing cable to the continuous mining machine had been cut and retaped in six different locations and the tape had been allowed to peel back thus exposing power leads.

Air from the conveyor belt entry was being used to ventilate active working faces and one stopping was not installed and another stopping only partially installed, thus correct belt isolation was not being achieved.

The rock dust applications were obviously inadequate on the roof, ribs and floor in the No. 34 entry from the 300 feet surveyor tag inby for a distance of 200 feet. Little to no rock dust had been applied on the floor of the No. 35 entry from the tail piece outby for a distance of 150 feet.

The ribs, roof and floor from the tail piece section inby for a distance of 150 feet in this same entry and in the No. 36 south entry from 25 feet inby the 350

foot surveyor tag inby for a distance of 150 feet.

The rock dust in these areas had been applied by hand and ranged in effectiveness from sparse to none.

Four samples were collected to substantiate these findings.

Old Ben contends that the conditions and practices cited did not constitute imminent danger as defined in section 3(j) of the Act. At the hearing held on August 22, 1973, testimony by Old Ben's safety director and the federal inspector who issued the order revealed that the essential facts were undisputed. However, while the witness for Old Ben stated that he believed all of the cited conditions were not imminently dangerous, the inspector stated that he believed they were, and for this reason he issued the Order of Withdrawal. He and the safety director testified that there were various amounts of loose coal in the area covered by the Order, four to 18 inches according to the inspector; uncertain according to the safety director who did not measure them. The inspector believed that the exposed power lead, although covered with one layer of insulation, could easily be cut by dragging on the ground or if it were run over by a piece of equipment, possibly causing a spark. Further, due to the presence of a "blue band" of rock in the coal seam the inspector stated that normal mining activity could cause a spark. He also thought the lack of adequate rock dusting, substantiated by test results showing percent incombustible material of less than 25% in all four

samples, exacerbated the already dangerous accumulations of loose coal and coal dust.

In his opinion, the Administration Law Judge (Judge) found the inspector's findings as to the loose coal and coal dust accumulations were supported by the record. Further, he found that the peeling trailing cable, the "blue band" of rock, and the energized permissible equipment were sources of ignition such as would support a conclusion of imminent danger when coupled with the conditions of incorrect belt isolation and inadequate rock dusting. Accordingly, the Judge held that the conditions cited in the Order constituted an imminent danger, that the Order was properly issued, and that Old Ben's Application for Review must be dismissed on the basis of the foregoing.

Issue Presented

Whether Old Ben has presented evidence to preponderate over the presumption that the above Order of Withdrawal was validly issued.

Discussion

Having reviewed the record and considered the brief of Old Ben, the Board finds that Old Ben has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Judge should not be affirmed. The arguments made on appeal to the Board have been fully and fairly considered by the Judge, and his decision is clearly supported by and is consistent with our decision in *Eastern Associated*

Coal Corporation, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

OLD BEN COAL CORPORATION

3 IBMA 282 Decided July 19, 1974

Appeal by Old Ben Coal Corporation (Old Ben) from a decision of an Administrative Law Judge (Docket No. VINC 73-98), dated March 12, 1974, dismissing an Application for Review of an imminent danger Order of Withdrawal filed by Old Ben pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969¹ hereinafter "the Act."

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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Accumulations of loose coal and coal dust together with sources of potential ignition will support a finding of imminent danger.

APPEARANCES: John T. Meredith, Esq., for appellant, Old Ben Coal Corporation; Richard V. Backley, Esq., Assistant Solicitor, and I. Avrum Fingeret, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On September 5, 1972, a Mining Enforcement and Safety Administration (MESA) inspector, during an inspection of Old Ben Coal Corporation's (Old Ben) Mine No. 21, issued *Order of Withdrawal No. 1 HG, September 5, 1972*, which cited the following conditions:

Coal float dust up to four inches in depth and a distinct black was deposited on rock dusted surfaces along the 56 south belt conveyor entry from the head roller to the 300 foot surveyor's tag, also around the belt drive and in the connecting crosscuts. Loose coal and coal dust accumulations were beneath the belt, and up to 2 feet in depth along the east side of 56 south belt for the length of the belt a distance of approximately 1,000 feet; float coal dust under and around the belt tail and outby for 50 feet up to 3 inches in height.

These conditions were recorded in the mine examiner's book for 7 previous shifts.

Room Nos. 37 and 38 had accumulations of loose coal and dust along ribs and roadways from 3 to 6 inches in depth, and from the room neck in by a distance of 150 feet; rock dust applications were obviously inadequate; rock dust had been applied by hand and little or no rock dust was applied to the roof, ribs and floor generally. Samples were taken to substantiate the findings.

The area covered by this Order was communicated to Old Ben's assistant safety director. The conditions were abated, and the Order terminated on the following day.

Old Ben filed a timely Application for Review of the Order, and a hearing before an Administrative Law Judge (Judge) was held on December 4, 1973. It is Old Ben's contention that the conditions and practices cited did not constitute imminent danger as defined in section 3(j) of the Act.

At the hearing the federal inspector who issued the Order testified to the effect that: there were large accumulations of float coal dust along the belt line; there were loose coal and coal dust accumulations under the belt of such a height that with only a little more spillage contact with the belt would be made which would cause friction and could result in a belt fire; he considered the electrically driven belt drive and its control panel to be sources of ignition; it was during his inspection of the belt line that he issued a verbal section 104(a) Order of Withdrawal, which he expanded, as seen above, upon inspecting Room Nos. 37 and 38; and that he reduced his verbal order to writ-

ing upon returning to the surface. He concluded that, based upon the conditions and practices cited in the Order, an imminent danger existed.

Old Ben's assistant safety director testified to the effect that: there was no methane in the area at the time of the inspection; ventilation was excellent; the float coal dust was too thin to measure in most places; there was an accumulation around the belt drive substantial enough to cover the rollers; the floors of Room Nos. 37 and 38 were damp; and he understood both the substance of the Order and the area to which it applied.

In his decision, the Judge found that: although there was some dispute as to the amount of the accumulation of loose coal and coal dust, there was no dispute that an accumulation did exist; although there had never been a sudden release of methane in this mine, it is a gassy mine; the accumulations under the belt were high enough to support the inspector's conclusion that a belt fire could occur; and in the presence of the combustible materials observed, any fire or explosion would become a grave hazard. Based upon the foregoing, the Judge concluded that an imminent danger had existed, that the inspector was justified in issuing the Order, and that Old Ben had failed to establish by a preponderance of the evidence that an imminent danger had not existed. Accordingly, he dismissed Old Ben's Application for Review.

Issue Presented

Whether the conditions cited in the Order of Withdrawal support the conclusion that an imminent danger existed.

Discussion

Old Ben contends that the conditions cited in the Order are not sufficient to support a conclusion that imminent danger existed. Although the witness for Old Ben testified that an accumulation existed, Old Ben contends, on appeal, that the inspector's concern about a possible belt fire was "speculation about dangers that might result if non-existent conditions unexpectedly developed." It is an undisputed fact that the accumulations cited had existed for seven previous shifts. It is also clear that Old Ben knew of the condition since it had assigned two men to clean up the accumulations. However, due to the fact that the condition persisted, such measures were inadequate. Based upon our review of the record, the Board finds that these accumulations existed and did not develop unexpectedly and concludes that normal mining operations could not proceed prior to or during abatement without risk of death or serious physical injury. By applying the test of imminent danger enunciated* in *Eastern Associated Coal Corporation*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973), we conclude that the cited conditions existing along the belt

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line, in the circumstances of this case, support the inspector's conclusion that an imminent danger existed. Accordingly, we hold that Old Ben has failed to establish by a preponderance of the evidence that imminent danger did not exist.

In its brief, Old Ben goes to great length in attempting to discredit the method of testing incombustible dust samples which yielded results which support the inspector's visual observation of inadequate rock dusting in Room Nos. 37 and 38. We believe that reliance on this argument is unfounded since both the inspector and the Judge relied solely on the belt line observations in arriving at their respective conclusions of imminent danger. In *Coal Processing Corporation*, 2 IBMA 336, 345, 80 I.D. 748, 752, CCH Employment Safety and Health Guide, par. 16,978 (1973), this Board adopted the Judge's language below in holding that, "[u]nder section 304(a) [30 CFR 75.400] a violation may be based upon visual observation without need of measurements or samples." We believe that the above is equally applicable when excessive accumulations are cited in a section 104(a) order of withdrawal. This Board sees no reason to consider Old Ben's argument on dust testing methods when, in its opinion, the belt line conditions were sufficient in and of themselves to support a conclusion of imminent danger.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge

I CONCUR:

DAVID DOANE,
Administrative Judge.

**PEGGS RUN COAL COMPANY,
INC.**

3 IBMA 289 Decided July 22, 1974

Appeal by Peggs Run Coal Company, Inc., from a decision by an Administrative Law Judge, dated December 19, 1973, assessing penalties in the sum of \$28,576 for violations of the Federal Coal Mine Health and Safety Act of 1969 under Docket No. PITT 71-68-P.

Affirmed in part and vacated in part.

Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The Board will not disturb the findings of fact of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

Federal Coal Mine Health and Safety Act of 1969: Evidence: Burden of Proof

A visual observation standing alone will not suffice to meet the Mining Enforcement and Safety Administration's burden of proof of a section 304(d) violation.

APPEARANCES: Richard M. Sharp, Esq., for appellant, Peggs Run Coal

Company; Mark M. Pierce, Esq., Stanley M. Schwartz, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

The alleged violations involved in this proceeding arise from inspections of Peggs Run Coal Company, Inc. (Peggs Run) No. 2 Mine, conducted by Bureau of Mines (now Mining Enforcement and Safety Administration (MESA)) inspectors in April through November of 1970. The amended Petition for Assessment filed by MESA charged 62 violations of safety or health standards set out in 57 Notices of Violations and 1 Order of Withdrawal. An extensive hearing on the matters involved was held before an Administrative Law Judge (Judge) in three sessions: December 20, 1971, at Pittsburgh, Pennsylvania; January 26, 27, and 28, 1972, at Arlington, Virginia; and July 24, 25, 26, and 27, 1972, at Pittsburgh, Pennsylvania.

The Judge's initial decision, issued on June 11, 1973, made findings of fact and conclusions of law as to each alleged violation but deferred assessment of monetary penalties until a decision was reached in a co-pending proceeding viz., *Peggs Run Coal Company, Inc.*, Docket No. PITT 72-28-P, which among other things, involved

a consideration of Peggs Run's safety compliance record from December 1970 through March 1971.

The Judge assigned two reasons for deferring the assessment of penalties in the instant case involving the No. 2 Mine. First, he noted that Peggs Run had raised a claim of financial hardship in the co-pending proceeding (Docket No. PITT 72-28-P), which, if proved, could provide a basis for a better informed assessment of specific monetary penalties in the instant case. Second, the Judge stated that Peggs Run's safety compliance record, as developed in Docket No. PITT 72-28-P, might serve to mitigate penalties that otherwise might be appropriate in the instant case (Docket No. PITT 71-68-P).

On December 19, 1973, the Judge issued a decision in Docket No. PITT 72-28-P assessing \$7,677 in civil penalties against Peggs Run. On the same date, he issued a decision assessing \$28,576 in civil penalties in the instant case, stating that the record of Docket No. PITT 72-28-P offered no mitigating circumstances and that, therefore, the assessments in the instant case were made without regard to the record in the other proceeding.

On appeal to this Board, Peggs Run challenges approximately two thirds of the more than fifty individual assessments set by the Judge, ranging from \$1 to \$2,000. In its brief filed with the Board, Peggs Run has incorporated by reference large portions of its brief filed with the Judge. We have carefully stud-

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ied both briefs and find that in many instances citations to relevant portions of the record are either missing, or, where given, do not disclose testimony which would warrant disturbing the findings or conclusions of the Judge. For example, the penalties assessed for four temporary splice violations,¹ are simply challenged in the appeal brief as "grossly disproportionate." With respect to another notice,² the appeal brief refers to the evidence "discussed on page 15 and 16" of the brief below. The discussion on the pages referred to contains one transcript citation to testimony not relevant to the issue. The violation charged in this instance is admitted but the thrust of the discussion by Peggs Run is directed toward the rigors of complying with the mandatory standards of the Federal Coal Mine Health and Safety Act of 1969 (Act).³ In numerous other instances we note that the Peggs Run brief is deficient and of little assistance in our review. It falls within the provisions of 43 CFR 4.601(a) which provides in relevant part:

* * * Appellant's brief shall set forth in detail the objections to the initial decision, the reasons for such objections and the relief requested. Any error contained in the initial decision that is not objected to may be deemed by the Board to have been waived.

¹ Notices of Violation Nos. 4 CLT, 9/21/70; 5 CLT, 9/21/70; 6 CLT, 9/21/70; 7 CLT, 9/21/70 (\$1,000 each).

² Notice of Violation No. 1 CLT, 9/22/70.

³ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Where any objection is based upon evidence of record, such objection need not be considered by the Board if specific record citations to the pertinent evidence are not contained in appellant's brief.

MESA's position is that the Judge's decision should be affirmed on all points. From our review of the record, it appears that while Peggs Run admits that most of the alleged violations cited by MESA actually occurred, it argues generally that:

a) the violations occurred during the infancy of the Act when materials were scarce;

b) the Judge improperly weighed the evidence; and

c) the Judge's assessments were so disproportionately large as to constitute an abuse of discretion.

The first argument is applied especially to two Notices, Nos. 2 JGS, 4/10/70; and 3 JGS 4/10/70, citing lack of air at working faces and the absence of line brattice. Peggs Run takes issue with the Judge's conclusion that the operator should have had brattice installed, bottomed on testimony showing that brattice was not readily obtainable by Peggs Run because of its credit standing, although it was available on the market (Tr. 1,443). This is not, in our view, a situation akin to that in *Buffalo Mining Company*, 2 IBMA 226, 259, 80 I.D. 630, CCH Employment Safety and Health Guide, par. 16,618 (1973) wherein we dealt with unavailability of equipment. We find no error in the Judge's conclusions on these two Notices.

Peggs Run's second argument, with exception of *Notice of Violation No. 6 TB, August 10, 1970*, (discussed below), likewise discloses no error in the Judge's evaluation of testimony, application of the law, or conclusions of law, and we therefore affirm his findings and conclusions on this point.

In its third argument, Peggs Run has not shown, or even alleged, that the penalties assessed by the Judge are inappropriate to the size of the mine, or would adversely affect its ability to continue in business. Therefore, again with exception of *Notice of Violation No. 6, TB, August 10, 1970*, we conclude that Peggs Run's allegations of error are insubstantial and without merit. Our review leads us to conclude that Peggs Run has shown no valid reason why the findings of fact and conclusions of law of the Judge should not be affirmed on this point.

With respect to *Notice of Violation No. 6 TB, August 10, 1970*, which cited Peggs Run for a violation of section 304(d) of the Act as follows:

The floor of 2 west main belt entry and the floors of entries in 1 right section of 2 west main were obviously inadequately rock dusted.

Although it is not in dispute that no dust samples were taken and analyzed by MESA to determine the percentage of incombustibility, the Judge nevertheless, found this violation to have been proved by MESA and assessed a penalty of \$1,000 therefor. We believe this was error. In *Hall Coal Company, Inc.*, 1 IBMA 175, 178, 79 I.D. 668, 671,

CCH Occupational Safety and Health Decisions, par. 15,380 (1972) the Board stated:

* * * Since Congress specifically delineated percentages, [of incombustibility] we have no alternative but to hold that an alleged violation of [304(d)] must be supported by more than mere visual observation of an inspector. Unless samples support an alleged violation of section 304(d), it cannot be sustained.* * *

The instant Notice (No. 6 TB) falls squarely under *Hall, supra*. Since the percentages required by section 304(d) of the Act were not properly established by MESA, we vacate this Notice and set aside the penalty assessed thereon.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED, except that *Notice of Violation No. 6 TB, August 10, 1970*, IS VACATED and the associated assessment in the amount of \$1,000 IS SET ASIDE.

IT IS FURTHER ORDERED that Peggs Run Coal Company pay the remainder of penalties assessed by the Judge in the total amount of \$27,576 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

August 14, 1974

MARATHON OIL COMPANY**16 IBLA 298**

Decided August 14, 1974

Appeal from a decision of the Director, Geological Survey, requiring corrected reports and recalculation of royalties from variable royalty rate leases committed to the Oregon Basin Unit Agreement. (GS-45 O&G.)

Affirmed.

Contracts: Construction and Operation: Generally—Words and Phrases

In construing contracts, "including" is a word of enlargement used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specially mentioned.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: General Rules of Construction—Oil and Gas Leases: Unit and Cooperative Agreements

Where a sentence in an oil and gas unit agreement prescribing a royalty rate is grammatically correct and as set out has a reasonable interpretation, its punctuation will not be changed.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: General Rules of Construction

In construing contracts, restrictive words normally apply only to the nearest antecedent.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: General Rules of Construction

The doctrine of practical construction does not apply unless an agreement is ambiguous.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: General Rules of Construction—Oil and Gas Leases: Unit and Cooperative Agreements

An oil and gas unit agreement, as other agreements, is not ambiguous merely because the parties disagree as to its meaning if the disagreement is not based on the reasonable uncertainty of the meaning of the language.

Oil and Gas Leases: Unit and Cooperative Agreements

The Oregon Basin unit agreement does not permit a repressuring well located outside the participating area to be counted as a producing well in computing the royalty due to the United States under variable royalty rate leases committed to the unit.

Contracts: Performance or Default: Waiver and Estoppel—Oil and Gas Leases: Unit and Cooperative Agreements—Waiver

The Department of the Interior is not estopped from requiring the operator of an oil and gas unit agreement to submit corrected reports, to recalculate royalty payments, and to pay additional money owed the government even though it accepted lower payments in the past where the lower payments were unauthorized.

APPEARANCES: Morris G. Gray, Esq., Division Attorney, Marathon Oil Company; David C. Branand, Esq., Office of the Solicitor, Department of the Interior.

OPINION BY
ADMINISTRATIVE
JUDGE THOMPSON

INTERIOR BOARD OF
LAND APPEALS

This appeal concerns the computation of royalty due to the United States under oil and gas leases issued by it which are committed to the Oregon Basin unit agreement entered into March 1, 1948. The leases have sliding or step scale variable rate royalties with the royalty computed on the basis of the average daily oil production per well—the higher the average production per well, the higher will be the royalty rate. The issue is whether a repressuring (injection or input) well¹ located outside the participating area of the unit may be counted as a producing well for royalty purposes. If wells outside the participating area are included in the count of producing wells, the royalty due to the United States would be decreased. If the repressuring wells outside the participating area are not included then, conversely, the royalty would be increased.

Marathon Oil Company (Marathon) is currently the unit operator. In 1960, to increase the rate of production in the unit, the operator of the unit at that time commenced a waterflooding program by use of injection wells in the Oregon Basin area. Section 8(a) of the unit agree-

ment, and the operating regulations, 30 CFR 221.1 *et seq.*, require the operator of the unit to submit plans for drilling operations to the Regional Supervisor, United States Geological Survey (Survey), for approval. In 1961 and subsequent years the operator submitted plans relating to the several participating areas within the unit. These plans identified producing and injection wells and their location by legal subdivision. The plans were approved and, as indicated by Marathon, the waterflooding program increased production and consequently the royalty to the United States. For the purpose of computing royalty payments, Marathon counted all the injection wells within *and* without the participating area.

Marathon objected to a request dated November 7, 1969, by a Survey accountant to furnish corrected reports which would exclude from the well count the injection wells outside the participating areas of the unit. Thereafter, the Regional Oil and Gas Supervisor by decision dated December 29, 1969, announced that only those injection wells within the participating area should be counted for royalty computations, and that back royalties were due for the years 1961–69. Marathon appealed to the Director of the Survey, who by decision dated September 20, 1971, affirmed the Supervisor's decision. The Director held that section 13 of the unit agreement prescribing the royalty computation permitted the

¹A well through which fluid or gas is introduced into the field to increase natural pressure.

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counting of injection wells within the participating areas of the unit as producing wells, but did not permit the inclusion of injection wells outside the participating areas. He concluded that the unit agreement term controlled and no operational decisions such as approving the location of injection wells could alter the agreement. He explained the failure of Survey to make this determination earlier as follows:

It is unfortunate that staffing limitations caused by budget restrictions prevent the Branch of Oil and Gas Operations from maintaining continuous audits on its royalty accounts. These limitations have forced the Branch to resort to the post auditing of accounts on an as time permits basis. A recent audit of the Oregon Basin unit account exposed the fact that 13 wells outside of the controlling participating area were being included in the well count used to compute royalties due. Prior to that time, the Survey's accounting department accepted appellant's monthly unit reports as filed and assumed that all wells included in appellant's Form 0201, "Individual Well Production Record" headed "Oregon Basin Unit North Embar-Tensleep Participating Area," were located within the controlling participating areas. No effort was made to check the actual location to see that all wells were within the controlling participating area.

The error involved in this case is one which would be difficult for accounting personnel to detect. It was discovered by an accounting clerk who questioned the fact that a lease which included an injection well did not receive an allocation of unitized production. The resulting investigation of the situation exposed the fact that, contrary to the specific language of the unit agreement, a total of 13 unqualified injection wells, i.e., wells located outside the controlling participating areas, were being included in the well

count for royalty purposes. As stated by the appellant, its reports were accepted by the Survey in good faith. However, these reports are now known to have been erroneous and the Supervisor has requested correction.

Marathon objects to this explanation asserting that the locations of all the injection wells are shown on survey maps and should have been ascertainable by accounting personnel. Basically, it makes the following contentions: (1) the clear language of the Oregon Basin unit agreement means that any well, wherever located, actually used for repressuring counts as a producing well; (2) application of rules of contract interpretation demonstrates the fallacy of the Director's decision; (3) the decision is contrary to the purposes of the unit agreement; (4) the decision is contrary to the practical construction of the agreement by the parties; and (5) because the government has acquiesced in Marathon's interpretation of the agreement by accepting royalty payments based on inclusion of all repressuring wells, it is now, in effect, estopped from asserting a different construction.

The questions raised here revolve specifically around the meaning of section 13 of the unit agreement, which states:

Subject to approval of the Supervisor, in accordance with the operating regulations, all oil wells shut in for conservation purposes in each participating area, including productive oil wells with excess gas-oil ratios and any and all wells of any character actually used for repressuring or recycling, shall be counted as producing oil wells; * * *

In support of its first contention, that the clear language of the unit agreement means that any repressuring well, wherever located, counts as a producing well, Marathon submits the following construction (the separations in the text indicate separate clauses or thoughts):

Subject to approval of the Supervisor, in accordance with the operating regulations, all oil wells shut in for conservation purposes in each participating area, including productive oil wells with excess gas-oil ratios and

any and all wells of any character actually used for repressuring or recycling, shall be counted as producing oil wells * * *

This reading, in contrast to the Survey's interpretation, makes "any and all wells * * * recycling" an independent clause, and includes in the royalty determination all repressuring wells wherever located.

To reach the above interpretation, Marathon notes that federal oil and gas leases are subject to ordinary rules of contract construction, see *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925); *Standard Oil Co. v. Hickel*, 317 F. Supp. 1192, 1197 (D. Alas. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971); *Amoco Production Co.*, 10 IBLA 215, 218 (1973), and applies three rules of contract construction to the sentence. The rules are: (1) "including" is a word of enlargement, not limitation; (2) punctuation may be inserted to give effect to the intention of the parties; and (3) re-

strictive words apply only to their nearest antecedent. Although we disagree only slightly with Marathon's statement of these rules, its application of them is incorrect.

As Marathon states in its appeal, "including" is a word of enlargement. *American Federation of Television and Radio Artists, Washington-Baltimore Local v. NLRB*, 462 F.2d 887, 889-90 (D.C. Cir. 1972); *Argosy, Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). "[I]nclud[ing] is used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specially mentioned." *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). For example, in the phrase "vehicles, for the purposes of this statute, includes tractors, * * *," "vehicles" is the larger class, and "tractors," the specially mentioned class. Any time "vehicle" is used, a "tractor" would be understood to be a "vehicle."

Here, the larger class is "oil wells shut in for conservation purposes." In reference to section 13 set out above, both the Survey and Marathon agree that "productive wells with excess oil and gas ratios" is a class specially mentioned and encompassed in the larger class of "oil wells shut in for conservation purposes." Marathon maintains that "wells used for repressuring" is not a specially mentioned class, but an independent, second "larger class." Although it maintains that this con-

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struction is evident from a first reading of the whole sentence, to clarify this meaning, they would correct the "obvious omission of a needed comma after ratio * * *." (Appellant's Memorandum Brief at 13.) We agree that if it is proper to insert the "missing" comma, the clause containing the phrase "repressuring wells" would be an independent clause—not part of the "including" clause.

Marathon states "that punctuation, or its absence, is always subordinate to the text of contracts * * * and that courts may insert necessary punctuation to give effect to the intention of the parties." (Citations omitted.) (Appellant's Memorandum Brief at 14.) Marathon fails to note the corollaries of the rule it relies on. Existing punctuation may be used as an aid in interpretation. *Plymouth Mutual Life Insurance Co. v. Illinois Mid-Continent Life Insurance Co.*, 378 F. 2d 389, 391-92 (3d Cir. 1967). Where a sentence is grammatically correct and as set out has a reasonable interpretation, the punctuation will not be changed. *Holgar Manufacturing Corp. v. United States*, 351 F. 2d 972, 975-76 (Ct. Cl. 1965). This rule defines the parameters in which judicial or administrative review can alter an agreement. Marathon does not contend that the sentence is grammatically incorrect and we find no such deficiency after our examination of the sentence. Since there is no grammatical deficiency, and as set out, the sentence has a reasonable mean-

ing, we decline to insert the "missing" comma. We find that the "repressuring wells" is a specially mentioned class of the larger class of "oil wells shut in for conservation purposes." We reach this conclusion even though, as Marathon asserts, a repressuring well may not normally be considered an oil well shut in for conservation purposes. An "including" clause is properly used to encompass categories which might not be contained in the ordinary meaning of a word. *Willheim v. Murchison*, 342 F. 2d 33, 42 (2d Cir.), cert. denied, 382 U.S. 840 (1965).

We agree with Marathon's third contention in this aspect of the case: that restrictive words normally apply only to the nearest antecedent. *United States v. Pritchett*, 470 F. 2d 455, 459 (D.C. Cir. 1972); *Hughes v. Samedan Oil Corp.*, 166 F. 2d 871, 873 (10th Cir. 1948). The restrictive words here are "in each participating area." They define the limits of permissible location of wells for royalty purposes. The nearest antecedent is "oil wells shut in for conservation purposes." The restrictive phrase therefore, applies to this clause. Marathon asserts this application exhausts the effect of the restrictive words. Its analysis fails at this point, however, since we decided previously "an oil well shut in for conservation purposes" includes "repressuring wells." The restrictive words apply to both.

Having applied pertinent rules of construction to the disputed clause, we do not agree with Mara-

thon's interpretation—we find that the proper unambiguous construction of the clause is:

Subject to approval of the Supervisor, in accordance with the operating regulations,

all oil wells shut in for conservation purposes in each participating area, including productive oil wells with excess gas-oil ratios and any and all wells of any character actually used for repressuring or recycling, shall be counted as producing oil wells * * *.

This construction applies the limiting words "in each participating area," to repressuring wells. Any and all wells actually used for repressuring or recycling, must, therefore, be in the participating area to be counted as a producing well for royalty purposes.

Marathon suggests that this interpretation is contrary to the purpose of the unit agreement. It states that the broad purpose of the unit agreement is to maximize recovery of oil and gas deposits in the unit. It alleges that "[t]o exclude otherwise countable wells on the artificial basis of location runs counter to the overriding purpose and prevading [sic] policy of the Oregon Basin Unit Agreement which is to encourage, not discourage, the maximum recovery of oil and gas without waste." (Appellant's Memorandum Brief at 19.)

We disagree with this contention for several reasons. First, the unit agreement requires the operator to maximize recovery of the unitized substances without regard to royal-

ties.² The placement of a repressuring well based on royalty rather than geological considerations would violate the unit agreement since the conservation measures are not explicitly or implicitly tied to the operator's royalties. Marathon's construction of the lease is also contrary to judicial interpretation of the purpose of federal leasing. "A second objective [after conservation] of the federal oil and gas lease is, of course, to maximize revenue for the lessor." *Standard Oil Co. v. Hickel*, 317 F. Supp. 1192, 1195 (D. Alas. 1970), *aff'd*, 450 F. 2d 493 (9th Cir. 1971). See *California Co. v. Udall*, 296 F. 2d 384, 388 (D.C. Cir. 1961). The unit agreement here is consistent not only with the goal of conservation, but also with the goal of revenue maximization. The *California Company* case also involved interpretation of a royalty rate clause in a federal oil and gas lease. One factor used by that court in rejecting the oil company's claim for lower royalty rates was the absence of any showing that the Department's interpretation would deprive the company of all profit or make a successful operation impossible. 296 F. 2d at 388. Here, under our ruling, as in *California*

² The unit agreement states:

"16. CONSERVATION: Operations hereunder and production of unitized substances shall be conducted to provide for the most economical and efficient recovery of unitized substances to the end that maximum efficient yield may be obtained without waste as defined by or pursuant to State or Federal law or regulations, and production of unitized substances shall be limited to such production as can be put to beneficial use with adequate realization of fuel and other values."

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Company, the ability of the lessee to operate at a profit is unquestioned, and is yet another indicia of the reasonableness and consonance of our interpretation with the purposes of the agreement and federal oil and gas leasing in general. We also note that in general, the unit agreement as a whole carefully distinguishes between participating and nonparticipating lease areas.

As its fourth contention, Marathon suggests, that in interpreting agreements great weight should be given to the manner in which an agreement is performed, especially if the performance occurs before the dispute arises. *E.g., Boswell v. Chapel*, 298 F. 2d 502, 506 (10th Cir. 1961). This rule, known as the doctrine of practical construction, does not apply, however, unless the agreement itself is ambiguous. *Amoco Production Co., supra*, at 218-19. See *Tri-Cor, Inc. v. United States*, 458 F. 2d 112, 126 (Ct. Cl. 1972); 4 *S. Williston, on Contracts*, § 623 at 797 (3rd ed. 1961). The doctrine is not applicable in this case.

An assertion of ambiguity, to be cognizable, must be based on more than possible contestability in the instrument. An agreement is not made ambiguous "merely because the parties disagree as to its meaning when the disagreement is not based on reasonable uncertainty of the meaning of the language used." *Tri-Cor, Inc., supra*, at 126. Under this rule an assertion does not substitute for a true lack of clarity. "Words do not become ambiguous simply because lawyers or laymen

contend for different meanings or even though their construction become[s] the subject matter of litigation." *Thomas v. Continental Casualty Co.*, 225 F. 2d 798, 801 (10th Cir. 1955). Before concluding that an agreement is ambiguous, the disputed portion should be read in light of the entire instrument and its avowed purpose. Normal meanings of the language and ordinary grammatical constructions should also be applied before concluding that ambiguity exists. See *Tri-Cor, Inc., supra*, at 126; *Gerhart v. Henry Disston and Sons, Inc.*, 290 F. 2d 778, 784 (3d Cir. 1961); *Kansas Farm Bureau Insurance Co. v. Cool*, 205 Kan. 567, 471 P. 2d 352, 356 (Sup. Ct. 1970). To determine ambiguity of a portion of an agreement without applying these considerations could create ambiguity where none exists.

We have already carefully reviewed the disputed clause in light of rules of contract construction and in light of the purpose of the unit agreement and concluded that the proper unambiguous interpretation of the contract is contrary to the alleged practical construction by the parties. Since there is no ambiguity here, we can give no weight to the alleged practical construction of the unit agreement. See, *e.g., F. D. Rich Co., Inc. v. Wilmington Housing Authority*, 392 F. 2d 841, 842 (3d Cir. 1968).

We hold that the Oregon Basin unit agreement does not permit repressuring wells located outside the participating area to be counted as

a well in computing the variable royalty rate.

The final argument raised is that because the Survey acquiesced in Marathon's interpretation of the unit agreement by accepting lower royalties, the government, in effect, is estopped from requesting the retroactive payments or correctly interpreting the agreement in the future. Marathon denies that the reasons given by the Survey—inadequate personnel and money to correctly audit the royalty payments—are adequate to avoid an estoppel. The government is not, however, estopped from receiving royalty payments it is owed, even where lower payments have been accepted in the past, unless the lower payments are authorized. *Atlantic Richfield Co. v. Hickel*, 432 F. 2d 587, 591 (10th Cir. 1970). The rule prevents government employees from overriding valid statutes, regulations or contracts by incorrect or unauthorized acts. *Id.* *Amoco Production Co., supra*, at 215. *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917). Here, the unit agreement did not authorize any government employee to accept a royalty payment calculated by including repressuring wells located outside the participating area. The "acquiescence" by the Survey in accepting the lower royalty payments was both incorrect and unauthorized and cannot bind the government. *Id.* 43 CFR 1810.3.

We are aware that despite the prevailing general rule that the government cannot be estopped by the unauthorized acts of its employees under a few extraordinary circumstances that rule has been pierced. For example, in *Brandt v. Hickel*, 427 F. 2d 53 (9th Cir. 1970), an oil and gas lease offer by Mary Brandt and Natalie Shell was rejected by the California State Office of the Bureau of Land Management. The decision rejecting the offer notified the applicants of their right to appeal, but also told them they could remedy the error in their offer without losing their filing priority by resubmitting new lease forms. In reliance on this latter procedure, the applicants chose not to appeal, but submitted new lease forms. A second applicant, Raymond Hansen, filed for the same lands after the original offer, but before the new offer was filed. His offer was rejected and he appealed. The Secretary of the Interior concluded that the State Office had no authority to give the amended filing retroactive effect; that the unauthorized promise to give retroactive effect was "regrettable," but not binding on him; that Brandt and Shell lost their right to appeal the local office's decision by not timely filing a notice of appeal; and that Hansen was entitled to the lease. *Raymond J. Hansen*, A-30179 (March 5, 1965).

One of the grounds relied on by the Circuit Court in reversing the Secretary's decision was that since Brandt and Shell were incorrectly

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informed a new lease offer could be filed which would retain their filing priority, the original decision of the State Office did not adequately inform them that they were adversely affected by the decision. This is the "promise" the Secretary's decision disavowed and termed "regrettable." The court discussed whether this misstatement was binding on the Secretary:

* * * Not every form of official misinformation will be considered sufficient to estop the government. See 2 K. Davis, Administrative Law Treatise Section 17.01 et seq. Yet some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement. * * *

* * * * *

* * * We conclude that the collateral estoppel doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision. The Secretary was understandably concerned that the estoppel doctrine can have a deleterious effect on administrative regularity. However, administrative regularity must sometimes yield to basic notions of fairness.

* * * * *

We would have a much different case if the booby trap unwittingly set for Mrs. Brandt and Mrs. Shell had somehow hurt the government. Bad advice cannot ordinarily justify giving away to individuals valuable government assets. This is no such case.

427 F. 2d at 56-57. The *Brandt* decision confirms the general rule that the government is not bound by the unauthorized statements of its employees, but sanctions an exception

to that rule where: (1) the erroneous advice is in the form of a crucial misstatement in an official decision; (2) the result of the misstatement violates standards of fundamental fairness; and (3) the public's interest is not unduly damaged by the imposition of the estoppel. See also *United States v. Lazy FC Ranch*, 481 F. 2d 985 (9th Cir. 1973); *Gestuvo v. District Director of United States Immigration & Naturalization Service*, 337 F. Supp. 1093 (C.D. Cal. 1971).

The *Brandt* rule clearly does not apply to this case. First, there was no crucial misstatement in an official decision. Construing the facts most favorably to Marathon, at the most there was unofficial, informal acquiescence by the Survey in accepting the payments, without requesting a recomputation of the amounts until 1969. Second, the effect of the "reliance" does not violate fundamental fairness. Marathon does not allege that it cannot continue to make a reasonable profit or continue to operate the field under our ruling. Third, *Brandt* involves a misstatement which deprived a person of a right granted by law. Marathon, is not being deprived of any right. To the contrary, the law is now being properly enforced. Fourth, unlike in *Brandt*, where the government was only a stakeholder, this case involves harm to the public's interest in the form of lost revenue. We hold that the government is not estopped from demanding the recomputations and deficiency payments. See *Robertson v. Udall*, 349

F. 2d 195 (D.C. Cir. 1965); *United States v. Ohio Oil Co.*, 163 F. 2d 633 (10th Cir. 1947), *cert denied*, 333 U.S. 833 (1948); *Sinclair Oil & Gas Co.*, 75 I.D. 155 (1968).

That the *Brandt* doctrine of estoppel is not applicable to the facts of this case is strongly supported by the decision in *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd per curiam*, Civil No. 73-1520 (D.C. Cir. March 12, 1974). There, the appellants alleged that the Department of the Interior was estopped from changing a long-standing regulation implementing section 17 of the Mineral Leasing Act of 1920 (41 Stat. 443), *as amended*, 30 U.S.C. § 226(a) (1970). The original regulation became effective in 1921. *Instructions*, 48 L.D. 98, 99 (1921). In 1967, the Department concluded that the practice authorized by the 1921 *Instruction* was clearly erroneous and contrary to the ordinary reading of the statute. Subsequently, departmental regulations were amended to reflect this decision. 43 CFR 3110.1-8. In response to appellant's contention that this change in the regulation was impermissible, the court concluded:

It is well settled that courts are to show great deference to the administrative construction of a statute where the statutory language is reasonably susceptible to more than one interpretation. *Udall v. Tallman*, *supra*, 380 U.S. 16-18, 85 S. Ct. 792; *Gulf Oil Corporation v. Hickel*, 140 U.S. App. D.C. 368, 372, 435 F. 2d 440, 444 (1970).

However, should an administrative statutory interpretation or regulation however long standing be clearly errone-

ous or contrary to the manifest intent of the statute it purports to construe or implement, such interpretation or regulation will not be upheld by a court. *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 52-54, 60 S. Ct. 51, 84 L. Ed. 20 (1939), rehearing denied, 308 U.S. 637, 60 S. Ct. 258, 84 L. Ed. 529; *District of Columbia v. Payne*, 126 U.S. App. D.C. 47, 51, 374 F. 2d 261, 265 (1966).

Nor is the administrative agency itself estopped by its former interpretation of a statute, however long standing, from correcting that which it presently feels to be clearly erroneous. As Mr. Justice Brennan, speaking for the Court, said in *Automobile Club of Michigan v. Commissioner of Internal Revenue*, 353 U.S. 180, 183, 77 S. Ct. 707, 709, 1 L. Ed. 2d 746 (1957):

The Commissioner's earlier rulings were * * * based upon a mistake of law * * *

* * * The doctrine of equitable estoppel is not a bar to [his] correction * * * of [that] mistake of law.

353 F. Supp. at 1012.

We think that the reasoning in *McDade* is even more appropriate to the facts of this case where there was approval of well locations and acceptance of rental payments without any formal ruling or decision applying the provision of the unit agreement in question. Estoppel cannot prevent the Department from applying the clear unambiguous meaning of the unit agreement in this case. The Department's decision to require corrected reports and to recalculate royalty payments is not limited by any prior incorrect and unauthorized acts. *Atlantic Richfield v. Hickel*, *supra*. *A fortiori*

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it is not limited here by any lapse or neglect of Survey employees.

Marathon has requested that this Board grant oral argument pursuant to its discretionary authority, 43 CFR 4.25. Appellant, in its brief, has presented its reasons for overturning the decision of the Survey. These have been considered. We see no useful purpose for an oral argument, nor would the Board's consideration of the case be facilitated thereby. Therefore, the request for oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

ATLANTIC RICHFIELD COMPANY
MARATHON OIL COMPANY

16 IBLA 329

Decided August 14, 1974

Appeals from separate decisions of the Director, United States Geological Survey, requiring corrected reports and

recalculation of royalties from variable rate royalty leases committed to the Elk Basin (GS-49) and Lost Soldier (GS-44) oil and gas unit agreements.

Affirmed.

Oil and Gas Leases: Unit and Cooperative Agreements

Both the Lost Soldier and Elk Basin unit agreements require the Regional Supervisor for the Geological Survey to exclude input wells located outside the participating area of each unit from the well count he makes as part of his determination of the variable rate royalty for these unit agreements.

Oil and Gas Leases: Unit and Cooperative Agreements

The Elk Basin and Lost Soldier unit agreements require the unit operator to locate input wells at optimal locations for recovery of the unitized substances anywhere in the unit area, regardless of royalty considerations.

Contracts: Performance and Default: Waiver and Estoppel—Federal Employees and Officers: Authority to Bind Government—Oil and Gas Leases: Unit and Cooperative Agreements

Normally, there can be no estoppel against the government based on the incorrect or unauthorized acts of its employees.

APPEARANCES: H. Blair Klein, Esq., Attorney, Marathon Oil Company; Frank B. Friedman, Esq., Attorney, Legal Division, Atlantic Richfield Co.; David C. Branand, Esq., Office of the Solicitor, United States Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

These appeals require us to determine if input wells¹ located outside the participating area, but inside the unitized area of two federal oil and gas unit agreements can be counted as producing wells for royalty purposes. The leases committed to these unit agreements are subject to a variable rate royalty based on the average production per well: as the production increases or the number of wells decrease, the percentage royalty increases.

Atlantic Richfield is the operator of the Lost Soldier unit agreement, and the holder of federal leases Cheyenne 029630(a), 029630(b), 063724, 065546, 065920, and 070341 committed to that unit agreement. Marathon is the holder of two leases, Billings 039112 and Wyoming 05717, which are committed to the Elk Basin unit agreement. We will refer to these parties collectively as "appellants."

The Lost Soldier unit includes the Tensleep oil and gas reservoir. In 1961, an engineering study submitted to the Department showed that the use of water injection to maintain the pressure in the field would increase the recovery in the Tensleep reservoir from 38 percent to 53 percent. As a result of this

study, the Lost Soldier unit agreement was drafted and executed. In a unit agreement, owners of working, royalty and other oil and gas interests agree to collectively develop and operate an oil and gas pool, field or like area for the purpose of conserving these resources. One of the lessees is designated as the unit operator. He is responsible for the production and development of the unit. Those portions of the unit which are reasonably proved to be productive of the unitized substances are designated as "participating areas." Each tract placed in a participating area receives a percentage of all unitized substances produced from the area. Sections 1-3, 8, 11 and 13 Lost Soldier Unit Agreement; Mineral Leasing Act of February 25, 1920, 41 Stat. 437, *as amended*, 30 U.S.C. § 181 *et seq.* (1970).

Atlantic Richfield counted input wells located outside the Tensleep participating area but inside the Lost Soldier unit area as producing wells. Until March 25, 1970, royalty payments calculated on that basis were accepted, without comment, by the United States Geological Survey (Survey). On that date, the Regional Petroleum accountant sent Atlantic Richfield a letter advising that the counting of input wells within the unit, but outside the Tensleep participating area was not a proper basis for calculating royalties. The Acting Regional Oil and Gas Supervisor confirmed the Regional Accountant's determination in a decision dated September 29,

¹ A well through which fluid or gas is introduced to increase the pressure in an oil field. They are also known as "repressuring" or "injection" wells.

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1970. His decision was, in turn, affirmed by the Acting Director of the Survey on September 16, 1971. Atlantic Richfield appealed this decision to the Board.

The Elk Basin unit includes the Embar-Tensleep participating area. In 1967, a peripheral waterflooding program was begun to increase the recovery in this area. As in the case of the Lost Soldier unit discussed above, input wells were initially counted as producing wells even though they were outside the participating area of the unit. On November 3, 1971, the Acting Oil and Gas Supervisor for the Northern Rocky Mountain Region decided that this practice was improper. The Acting Director for the Survey affirmed this decision on July 11, 1972. Marathon now appeals this decision.

In both cases, the Acting Director's rationale for his decision was identical. In the decision on the Lost Soldier unit he said:

Inasmuch as the Lost Soldier unit agreement specified that for purposes of computation of royalty rates the "average production shall be determined in accordance with the operating regulations as though each participating area were a *single consolidated lease*" and since the oil and gas operating regulations limit the well count for determining royalties due on step-scale and sliding-scale leases to "*wells on the leasehold*", it is clear that the Supervisor is without authority to permit the inclusion of injection wells located outside the governing participating area in the well count used to determine the royalty rate due

the United States on production allocated to any Federal leases on which the royalty rate depends on the daily average production per well.

We are considering these appeals together because they present the identical issue for review. Royalties for the leases committed to each unit agreement are determined by reference to the operating regulations and separate but essentially identical provisions of the unit agreements. Both the Elk Basin and Lost Soldier unit agreements provide that royalties for leases with variable rate royalties are to be computed by: (1) treating the participating area of each unit agreement as if it were a single consolidated lease; and (2) by reference to the operating regulations, in this case, 30 CFR 221.49.

Appellants argue, in essence: (1) the only rational interpretation of the operating regulation, 30 CFR 221.49, is that it is specifically designed to authorize inclusion of input wells in the well count for royalty computation of variable rate leases whether or not such wells are located inside or outside of a unit participating area; (2) the Survey's decision is contrary to the "clear purpose and plain meaning of the regulation," or if the regulation is ambiguous, it must be construed against the Government; (3) the Government is estopped because of its long administrative practice to the contrary to change the regu-

lation;² and (4) subparagraph (b) of 30 CFR 221.49 should be a separate part of the regulation.

Appellants' first assertion is that the only rational interpretation of 30 CFR 221.49 is that it is specifically designed to include all input wells in the well count for royalty purposes. The regulation is organized into one main paragraph and nine subparagraphs. The main paragraph prescribes the general mechanism for computing the variable royalty rate for unit agreements. The nine subparagraphs prescribe rules for particular aspects of royalty rate calculation.

The regulation, 30 CFR 221.49, minus the irrelevant subparagraphs, states:

[1] *Sliding- and step-scale royalties are based on the average daily production per well.* The supervisor shall specify which wells on a leasehold are commercially productive, including in that category all wells, whether produced or not, for which the annual value of permissible production would be greater than the estimated reasonable annual lifting cost, but only wells which yield a commercial volume of production during at least part of the month shall be considered in ascertaining the average daily production per well. [2] *The average daily production per well for a lease is computed on the basis of a 28-, 29-, 30-, or 31-day month (as the case may be), the number of wells on the leasehold counted as producing*

and the gross production from the leasehold. (Tables for computing royalty on the sliding-scale and on the step-scale basis may be obtained upon application to the supervisor.) [3] *The supervisor will determine which commercially productive wells shall be considered each month as producing wells for the purpose of computing royalty in accordance with the following rules, and in his discretion may count as producing any commercially productive well shut-in for conservation purposes:*

* * * * *

(b) Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if so used 15 days or more during the month and shall be disregarded if so used less than 15 days during the month.

[Italics and bracketed numbers added.]

According to the unit agreements, each participating area is to be treated as a consolidated lease. The term "on the leasehold," in the regulations, therefore refers to the participating area of the unit only. Section 14 Lost Soldier Unit Agreement; Section 21 Elk Basin Unit Agreement.

The sentence numbered [1] sets forth the basis for royalty computation: average daily production per well. The sentences numbered [2] and [3] and the subparagraphs direct the Supervisor how to determine average daily production per well. The sentence numbered [2] prescribes the time period over which production is to be averaged (a 28-, 29-, 30-, or 31-day month); where the wells to be counted must be located (on the leasehold); and where the oil produced must come from (the leasehold). Again, the term "on the leasehold" refers only

² The administrative practice involved is approval of input wells in development plans and acceptance of royalties. Approval in a development plan is a prerequisite to drilling wells and is made independently of any royalty consideration. The approval concerns only the geological and engineering aspects of the operating plan, and cannot be construed to affect the proper determination of the royalty. The effect of the acceptance of the royalties is discussed *infra*.

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to the participating area of the unit. The sentence numbered [3] directs the Supervisor to refer to nine subparagraphs to determine for the month in question which wells on the leasehold have been *used* in a manner that qualifies them to be counted as producing wells. Subparagraph (b) tells the Supervisor that for input wells, the minimum prerequisite period of use is 15 days. The organization of the regulation compels us to conclude, contrary to appellant's assertions, that the location limitation in the sentence numbered [2] in the main paragraph applies to all of the subparagraphs. The regulation has been in the present form since 1942. 7 F.R. 4137 (1942). There is no logical reason to place the provision concerning input wells where it is if the qualifications of the main paragraph do not apply to it. The regulation is not specifically designed to include input wells in the well count.

We also find that there is no reasonable basis to the assertion that the regulation is ambiguous and we decline to construe it against the Government. *Tri-Cor, Inc. v. United States*, 458 F. 2d 113, 126 (Ct. Cl. 1972); *Standard Oil Co. v. Morton*, 450 F. 2d 493, 494 (9th Cir. 1971). We conclude that the requirements in the sentence numbered [2] of 30 CFR 221.49 apply to all nine subparagraphs, including subparagraph (b). The Supervisor for the Lost Soldier and Elk Basin unit agreements has no authority to include input wells located outside the participating area of each unit in

the well count made as a part of his determination of the variable rate royalty for these unit agreements.

Appellants assert that the purpose of the unit agreement is to promote conservation by maximizing recovery of unitized substances and that construing 30 CFR 221.49 to exclude certain input wells from the royalty computation is counter to that purpose. Regulations, like statutes, must be construed consistently with the purpose of enactment. *Rucker v. Wabash Railroad Co.*, 418 F. 2d 146, 149 (7th Cir. 1969). The purpose of oil and gas unit agreements approved by the Government is not only promotion of conservation, but also maximization of revenue for the Government. *Standard Oil v. Hickel*, 317 F. Supp. 1192, 1195 (D. Alas. 1970), *aff'd*, 450 F. 2d 493 (9th Cir. 1971). *See California Co. v. Udall*, 296 F. 2d 384, 388 (D.C. Cir. 1961). Marathon states:

The obvious reason for authorizing injection wells to be counted as producing wells under the regulations for royalty computation purposes is to encourage the use of such wells to promote the conservation of oil and gas resources and to maximize the recovery thereof without waste.

This argument fails to recognize that both unit agreements, in sections captioned "Conservation,"³ require the operator to use the most economical and efficient recovery methods to achieve maximum economic yield of the unitized sub-

³ Section 23 Elk Basin unit agreement and section 16 Lost Soldier unit agreement.

stances. This conservation requirement is totally independent of the royalty clause. There is no cross reference from royalty to conservation in either the unit agreement or the operating regulations. The unit operator must locate input wells at optimal locations for recovery of the unitized substance anywhere in the unit area regardless of the royalty impact. The location of input wells based only on royalty considerations would violate the terms of the unit agreement if the placement did not coincide with the maximum recovery of unitized substances. Appellants' argument, that excluding input wells not in the participating area from royalty well counts is contrary to the purpose of the agreement, is not credible, since the conservation requirement exists independently of any royalty considerations.

The final argument is that because the Survey accepted lower payments in the past, they are now estopped from pursuing the correct interpretation of the unit agreement and regulations. As we stated in *Marathon Oil Co.*, 16 IBLA 298, 81 I.D. 447, (1974), also decided today, normally, there can be no estoppel against the government based on the incorrect or unauthorized acts of its employees. *E.g.*, *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587, 591 (10th Cir. 1970). Our decision in *Marathon Oil Co.*, *supra*, includes a full discussion of this issue in an almost identical factual context. Based on that decision, we

hold there is no estoppel in this case.

We also doubt whether the companies could show the necessary reliance even if this were a situation where estoppel was applicable. In its Supplemental Statement of Reasons to the Acting Director of the Survey, Marathon stated:

We do not contend that the countability of these wells for royalty computation purposes was specifically discussed with representatives of the Survey either by the Appellant or by the operator or that the Regional Supervisor affirmatively promised that these wells would be countable for royalty computation purposes. We do say, as is implicit from the circumstances, that these injection wells were regarded for all purposes by all persons involved as being exactly like any other injection wells located inside of participating areas. The simple fact is that the locations of wells were not regarded as significant for any purpose.

It appears from this statement that Marathon was not relying on any acts by Departmental employees, but on its own mistaken interpretation of the Agreement.

Atlantic Richfield has requested that this Board grant oral argument pursuant to our discretionary authority in 43 CFR 4.25. In Atlantic Richfield's brief, it has presented its reasons for overturning the decision of the Survey. These have been considered. We see no useful purpose for an oral argument, nor would the Board's consideration of the case be facilitated thereby. Therefore, the request for oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of

August 26, 1974

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

ASSOCIATED DRILLING, INC.

3 IBMA 297

Decided August 26, 1974

Appeal by Associated Drilling, Inc., from a decision by an Administrative Law Judge (Docket No. PITT 71-226-P), dated December 7, 1973, assessing civil penalties in the amount of \$525 for 10 violations pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969,¹ hereinafter "the Act."

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

Where the Administrative Law Judge has taken into consideration mitigating circumstances advanced by the operator in determining the assessment of penalties, and where appellant's arguments have been fully and fairly considered by the Judge, the Board will not disturb the Judge's decision where his findings are supported by substantial evidence.

APPEARANCES: Richard M. Sharp, Esq., for appellant, Associated Drilling, Inc. The Mining Enforcement and Safety Administration (MESA) did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The Administrative Law Judge's (Judge) decision of December 7, 1973, was issued after this Board had remanded for reconsideration his initial decision in this case issued on December 5, 1972. In ordering the remand, the Board stated that the findings of fact and conclusions of law were inadequate to permit a proper review of the decision. *Associated Drilling, Inc.*, 2 IBMA 95, 80 I.D. 317, CCH Employment Safety and Health Guide, par. 15,747 (1973). Consistent with the views expressed in our order of remand, the Judge issued a new decision in this case on December 7, 1973, in which he assessed civil penalties of \$525 after finding that 10 violations had occurred and considering the six statutory criteria of section 109 of the Act.

Associated Drilling, Inc. (Associated) is now appealing the Judge's findings concerning only two of the ten violations established in the proceeding below. The first of these involved a violation of section 303(k)

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

of the Act in that air which entered and passed through an abandoned mine was used to ventilate working places in Associated's mine. According to testimony at the hearing, the abandoned mine, not owned by Associated, interconnected with Associated's mine for approximately 900 feet and that in order to prevent the violation of the Act cited it was necessary to construct between 175 and 200 permanent stoppings. Associated contends that, although a technical violation of the Act occurred, due to the extensive amount of time required to abate the violation, no penalty should be assessed and that the \$25 penalty assessed by the Judge should be set aside.

In the second of these violations, Associated was cited for a violation of section 305(k) of the Act in that a 440 volt A.C. power line was in contact with posts at many locations and was not installed on adequate insulators at others. Associated contends that the Judge should not have found this violation to be serious in view of the fact that he had received evidence that the line actually had 600 volt insulation which was in excellent condition. Consequently, Associated contends the \$100 penalty assessed by the Judge should be reduced or set aside.

Issues Presented

Whether the Judge assessed a fair and reasonable penalty for the violation of section 303(k) of the Act in the circumstances of the instant case.

Whether the Judge erred in finding a violation of section 305(k) of the Act to be serious.

Discussion

Section 109(a) (1) of the Act requires that when a violation of the Act has been established, a civil penalty must be assessed, the amount of which is to be determined after considering the six criteria listed therein. Associated admits that a violation of section 303(k) occurred. In assessing a penalty of \$25 for this violation, the Judge considered the six criteria of section 109, and also took into account the amount of time required to abate the violation.

[1] As this Board enunciated in *Myers Coal Company*, 2 IBMA 167, 80 I.D. 578, CCH Employment Safety and Health Guide, par. 16,499 (1973), it will not disturb the findings of a Judge which the record supports and where it appears he has fully and fairly considered the arguments urged on appeal. Likewise, we will not alter the amounts assessed if they are reasonable and properly take into account all mitigating circumstances. The Judge's decision and assessment for the violation of section 303(k) of the Act satisfactorily meet the standards set forth in *Myers Coal Company*, and, therefore, must be affirmed.

Based upon our decision in *Galloway Land Company*, 2 IBMA 348, 80 I.D. 781, CCH Employment Safety and Health Guide, par. 17,011 (1973), the finding by the

SUNNY COVE DEVELOPMENT CORPORATION

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August 27, 1974

Judge that the violation of section 305(k) of the Act was serious will not be disturbed in the absence of a showing that the evidence compels a different result. Although testimony was given by a witness for Associated that the power line cited in the Notice of Violation had adequate insulation, the Judge concluded that the power line being in contact with a number of posts constituted a serious violation of the Act due to the danger of combustion and electrical shock. His finding is supported by the evidence, and he properly weighed the conflicting testimony. Therefore, we will not disturb his finding simply because he attached less weight to the testimony of the Associated witness than to the testimony of MESA's witness. The record and decision indicate that the Judge carefully considered all the evidence before him. We find no error or abuse of discretion in his finding that the above-cited violation was of a serious nature. Neither do we find that his assessment of \$100 therefor was excessive or unreasonable.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of December 7, 1973, in the above-captioned case IS AFFIRMED and that Associated Drilling, Inc.,

pay penalties in the amount of \$525 on or before 30 days from the date of this decision.

C. E. ROGERS, Jr.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

*Administrative Judge.*ADMINISTRATIVE APPEAL OF
SUNNY COVE DEVELOPMENT
CORPORATION

v.

FLORA CRUZ, A/K/A FLORIDA
PATENCIO, LESSOR

3 IBIA 33

Decided August 27, 1974

Appeal from an administrative order
canceling a lease.

Affirmed.

Indian Lands: Leases and Permits:
Long-term Business: Cancellation

A lease may be canceled by the Secretary,
at the request of the lessor where lessee
has failed to carry out specific provisions
of the lease.

Indian Lands: Leases and Permits:
Long-term Business: Rentals—Indian
Lands: Leases and Permits: Long-term
Business: Waiver—Indian Lands:
Leases and Permits: Long-term Business:
Generally—Waiver

Acceptance of rentals by the lessor subsequent
to default on specific provisions of
the lease by the lessee does not constitute

waiver of the items in default in the absence of showing that the lessor voluntarily and intentionally waived the requirements under the lease.

APPEARANCES: Dillon, Boyd, Dougherty & Perrier, a professional corporation, for appellant, Sunny Cove Development Corporation, a California corporation; William N. Wirtz, Attorney at Law, Sacramento Regional Solicitor's Office, for the Area Director, Bureau of Indian Affairs, appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

By special delegation of authority, the above-entitled matter directed to the Commissioner, Bureau of Indian Affairs, was transferred on July 27, 1973, by the Assistant to the Secretary for Indian Affairs to the Director, Office of Hearings and Appeals, under delegation of authority as dated August 6, 1973. The Director, by delegation of authority dated August 6, 1973, referred the matter to the Board of Indian Appeals for final determination. Copies of the above-mentioned delegation of authority were attached and made a part of the docketing notice of September 10, 1973.

The appeal of Sunny Cove Development Corporation is from the decision of the Area Director, Bureau of Indian Affairs, Sacramento, California, dated April 16, 1973, canceling a long-term business lease covering a portion of the original trust allotment of Santos Albert

Patencio, Agua Caliente (Palm Springs), Allottee No. 12.

The lease in question identified as PSL No. 94, Contract 14-20-J50-1259, hereinafter referred to as lease, was executed by Sunny Cove Development Corporation, a California corporation, and Flora Cruz, also known as Florida Patencio, hereinafter referred to as lessor, on March 18, 1965. The Bureau of Indian Affairs, as trustee for the lessor, hereinafter referred to as Bureau, approved the lease for a period of twenty-five (25) years effective as of May 12, 1965.

The dispute focuses on Articles, 6, 7, and 8 of the lease. The lessor and the Bureau claim nonperformance of the Articles while the appellant claims waiver of performance.

Article 6, in its pertinent part, provides:

6. PLANS AND DESIGNS

Within 180 days after the approval of this lease, the Lessee shall submit to the Secretary for approval, a general plan and architect's design for the complete development of the entire leased premises. Before beginning any construction whatsoever on the leased premises, the Lessee shall submit to the Secretary comprehensive plans and specifications for the improvements then proposed; the Secretary shall approve them if they conform to the general development plan, but shall not thereby assume any responsibility whatever for detailed design of structure or structures or violation of any State, county or city law or ordinance. The Secretary shall either approve or state his reasons for disapproval of plans and specifications within thirty (30) days after receipt thereof

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from Lessee. No change will be made in plans or specifications after approval without the consent of the Secretary.

Article 7, in its pertinent part, provides:

7. IMPROVEMENTS

As a material part of the consideration of this lease, the Lessee covenants and agrees that within five (5) years after the beginning date of the term of this lease, Lessee will have completed construction of permanent improvements on the leased premises at a cost of and having a reasonable value of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00).

All buildings and improvements, excluding removable personal and trade fixtures, on the leased property shall remain on said property after the termination of this lease and shall thereupon become the property of the Lessor. The term "removable personal property" as used in this Article shall not include property which normally would be attached or affixed to the buildings, improvements or land in such a way that it would become a part of the realty, regardless of whether such property is in fact so placed in or on or affixed or attached to the buildings, improvements or land in such a way as to legally retain the characteristics of personal property.

Lessee expressly waives the provision of Section 1013.5 of the California Civil Code pertaining to improvements affixed to the land by any person acting in good faith and erroneously believing because of a mistake either of law or fact that he has a right to do so, and also providing for removal of such improvements.

Article 8, in its pertinent part, provides:

8. COMPLETION OF DEVELOPMENT

The lessee shall complete the full improvement, development and construc-

tion on the leased premises in accordance with the general plan and architect's design, submitted in accordance with Article 6, Plans and Designs, above, within five (5) years from the beginning date of the term of the lease. If the Lessee fails to complete full improvement, development and construction within such period, the guaranteed minimum annual rental payable under this lease shall increase ten percent (10%) at the beginning of the next fiscal year of this lease. For each full fiscal year thereafter that the Lessee fails to complete such full improvement, development and construction, the guaranteed minimum annual rental payable under this lease shall be increased an additional two percent (2%).

Whenever under this instrument a time is stated within which or by which original construction, repairs, or reconstruction of said improvements shall be completed and if during such period a general or sympathetic strike or lockout occurs, war or rebellion occurs or some other event which is unquestionably beyond Lessee's power to control occurs, the period of delay so caused shall be added to the period allowed herein for the completion of such work.

The lease covers about 4.29 acres which the appellant was required to fully develop and improve. To this end, Article 6 required the appellant to submit to the Secretary's representative in the Bureau a general plan and architect's design of the complete development of the entire leased premises within 180 days from the approval date of the lease.

According to the administrative files, the Bureau notified the appellant on several occasions that it was in default of Article 6 of the lease. In response thereto, the appellant

did, during that time, submit a rough sketch plan of development. This plan was found unacceptable for approval by the Bureau. This apparently was the only plan for development of the leased premises ever submitted by the appellant to the Bureau.

Thereafter, the following chain of events appears to have taken place regarding the improvements. On July 5, 1966, appellant was notified by Frank Hamerschlag, Civil Engineer, that the property described in the lease did not coincide with a state highway and was in error in two other respects. Based upon Mr. Hamerschlag's survey, the Bureau thereafter prepared and furnished to appellant's attorney at that time, Mr. Raymond Simpson, a corrected legal description. Thereafter, on July 18, and 21, 1966, Mr. Simpson tendered to the appellant a supplemental agreement to correct the legal description. On January 19, 1967, the Bureau requested of appellant's attorney a status report on the proposed supplemental agreement. The Bureau on January 25, 1967, was advised by Mr. Simpson that appellant had requested a temporary suspension of the proposed supplemental agreement to allow time to obtain additional information and materials. The request was acknowledged on February 21, 1967, by the Bureau. On March 7, 1967, Mr. Simpson advised the Bureau that the supplemental agreement would be discussed with appellant's corporate president and that the Bureau

would be advised of appellant's intention regarding the execution of the supplemental agreement.

Thereafter, on January 12, 1968, the appellant was issued a warning notice for defaults under the lease. The appellant's corporate president, in response thereto, on February 5, 1968, informed the Bureau that the appellant was taking curative action on the listed defaults and that it needed additional time to prepare the plans and designs required by Article 6 of the lease.

Apparently, in the absence of any further developments, the Bureau on March 25, 1970, issued an Order to Show Cause Notice to appellant to show cause within 10 days thereof why the lease should not be canceled. The failure of the appellant to execute the supplemental agreement correcting the property description was brought to the attention of the appellant in the show cause letter. The Order to Show Cause Notice was acknowledged by appellant on March 25, 1970. At the request of the lessor, the lease cancellation proceedings were suspended.

On December 6, 1972, Mr. Simpson, appellant's attorney, requested that cancellation proceedings be initiated on the lease. The Bureau on January 5, 1973, served appellant with an Order to Show Cause why the lease should not be canceled. Appellant again requested negotiation. The request was denied and on January 13, 1973, the Bureau served on the appellant its 60 day notice of default on the lease.

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Thereafter, on April 16, 1973, the Bureau notified appellant that the lease was canceled as of that date.

It is from the foregoing decision that the appellant has appealed. The appellant in support thereof sets forth the following arguments as to why the lease should not be terminated or canceled:

1. The lease should not be forfeited because appellant is not in default of its obligation to submit a plan and design and complete construction of the improvements. Article 8 of the lease provides that the time periods for submission of plans and completion of improvements are extended if events occur which are beyond appellant's power to control.

2. The lease should not be forfeited, because the lessor, with notice of the alleged defaults of appellant, accepted rent, and continues to accept the rent, for several years after the alleged defaults occurred. Under California law this amounts to a waiver and precludes forfeiture of the lease.

The Board is not in agreement with appellant's first argument that its failure to perform under Articles 6, 7 and 8 were beyond its control due to (1) an incorrect description of the leased premises which the Bureau and the lessor refused to correct and (2) the demand of the County of Riverside that appellant bear the entire cost of providing flood control on the leased premises and abutting properties which did not justify the costs of such required improvements.

The record contrary to appellant's argument regarding the incorrect description indicates the Bureau and the lessor shortly after July 5,

1965, presented to the appellant an amendment to the lease to correct the description thereof. No reason has been given by the appellant as to why the supplemental agreement correcting the description of the leased premises was not executed by the appellant, notwithstanding the fact it had ample opportunity to do so.

The demands of Riverside County admittedly were beyond the control of the appellant. The requirement, however, did not present a condition which was impossible for the appellant to fulfill. The appellant, prior to entering into the lease, should have anticipated or should have known that the County would have certain requirements as a condition to the issuance of a use permit.

Regarding the foregoing arguments, the Board finds the arguments were not entirely beyond the control of the appellant and therefore did not preclude performance under Articles 6, 7 and 8 of the lease, and accordingly, an extension was not justified under Article 8.

Appellant's second contention or argument that lessor and the Bureau of Indian Affairs are estopped and precluded from canceling the lease because the acceptance of the rentals by the lessor after the period of time in which the appellant was to perform under articles 6, 7 and 8 constituted a waiver of such default and that the appellant is discharged and forever excused from performing thereunder.

In this connection, the record indicates the appellant requested numerous extensions of time in which to cure the defaults under Articles 6, 7 and 8. These requests and the negotiations hereinabove mentioned that followed clearly led the Bureau of Indian Affairs and the lessor to believe that appellant intended to carry out its commitments under Articles 6, 7 and 8. Moreover, the record indicates the Bureau and the lessor never at any time waived the requirements of Articles 6, 7 and 8. The record further indicates the parties were attempting to resolve their differences through negotiations right up to the time administrative action was commenced to terminate the lease.

The delay in instituting action to terminate the lease can only be attributed to the appellant's action or inaction. The Bureau and lessor, as the record indicates, in good faith relied upon the representation of the appellant that it intended to carry out its commitments as required by Articles 6, 7 and 8 of the lease. In reliance thereof, default proceedings were delayed and rentals collected for that period of time.

Estoppel against the Government should be invoked only in rare and unusual circumstances. It should be applied against the Government only in those cases where interests of justice clearly require it. The doctrine of estoppel must be applied with great caution to the Government and its officials. (31 C.J.S. Estoppel § 138); *United States v.*

Gross, 451 F. 2d 1355 (7th Cir. 1971).

In the case at bar, justice certainly would not be served if estoppel were invoked against the Government, particularly where as the record indicates the appellant's action or inaction, not that of the Bureau and lessor, was instrumental in delaying default proceedings.

The general rule on estoppel in California was adopted in the case of *Dolbeer v. Livingston*, 100 Cal. 621, 35 P. 328 (1893), wherein it was stated:

* * * "[W]here a person, by word or conduct, induces another to act on a belief in the existence of a certain state of facts, he will be estopped as against him, to allege a different state of facts" * * * 'Estoppel in pais may be defined to be a right arising from acts, admissions, or conducts which have induced the change of position in accordance with the real or apparent intention of the party against whom they are alleged.' * * * 'Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, * * *'

In light of *Dolbeer v. Livingston, supra*, the appellant due to its action or inaction in delaying default proceedings, is in no position to invoke the defense of estoppel.

Waiver, under the circumstances in this case, did not exist as neither the Bureau nor the lessor intended to waive the requirements of Articles 6, 7 and 8. A waiver is comprehensively defined as a voluntary intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such

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waiver the party would have enjoyed. (31 C.J.S. Estoppel § 61.)

In the case of *Sessions, Inc. v. Morton, et al.*, 348 F. Supp. 694 (C.D. Cal. 1972); *aff'd* 491 F. 2d 854 (9th Cir. 1974), the District Court under similar factual evidence as in the case at bar found that there was no waiver. The Circuit Court in sustaining the lower court's ruling in *Sessions, supra*, on waiver stated:

* * * While it is a generally stated rule that the lessor's acceptance of rent after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case. *Jose v. Iglesias*, 462 F. 2d 214, 216 (9th Cir. 1972); *In re Wil-Low Cafeterias, Inc.*, 95 F. 2d 306, 309 (2d Cir.) *cert. denied, sub nom. Wil-Low Cafeterias, Inc. v. 650 Madison Avenue Corporation*, 304 U.S. 657 (1938). * * *

Accordingly, under the foregoing circumstances, the appellant's arguments regarding estoppel and waiver of the requirements of Articles 6, 7 and 8 are untenable and without merit and the Board so finds.

The appellant's position and attitude regarding the requirements under Articles 6, 7 and 8 appears to be quite clearly set forth in the letter dated January 16, 1973, to the Bureau of Indian Affairs from appellant's former counsel, Philip M. Savage, III, of the law firm of Lonegeran, Jordan,

Gresham and Varner, in the following words:

As indicated in my prior letter, it is neither the desire nor the intention of Sunny Cove Development Corporation to only reinstate the existing lease even if the clauses concerning improvements are deemed to have been waived for all time. Rather, it is the intention and desire of the Sunny Cove Development Corporation to re-negotiate a new, long-term lease, under which it is economically possible to improve the premises as the Landlord desires and utilized [sic] the premises for the benefit of the Landlord and tenant.

The foregoing excerpt from its letter of January 16, 1973, indicates appellant never intended to carry out its commitments under Articles 6, 7 and 8 of the lease and was primarily interested only in renegotiating a new, long-term lease.

The appellant has shown no compelling reasons why the Area Director's decision of April 16, 1973, canceling the lease No. PSL-94 should not be affirmed. Accordingly, the Area Director's decision should be affirmed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (Section 211.13.7, Departmental Manual, December 14, 1973), the decision of the Area Director of April 16, 1973, canceling lease No. PSL-94 be, and the same is hereby **AFFIRMED** and the appellant's appeal is **DISMISSED**.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

UNITED STATES
v.
KENNETH McCLARTY

17 IBLA 20

Decided *August 29, 1974*

Appeal from Contest No. OR-4435 (Wash.), the decision of the Administrative Law Judge Graydon E. Holt, recommending that the Snoqueen placer claim be declared null and void.

Recommended decision not adopted. Contest dismissed.

Mining Claims: Common Varieties of Minerals: Generally

Whether a deposit of building stone is a common variety and no longer locatable under the mining laws since the Act of July 23, 1955, or is still locatable as an uncommon variety, depends on whether it has a unique property giving it a special and distinct value.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Common Varieties of Minerals: Special Value—Mining Claims: Common Varieties of Minerals: Unique Property

To determine whether a deposit of building stone is a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar stone in order to ascertain whether

the deposit has a property giving it a distinct and special value. The value may be for some use to which ordinary varieties of building stone cannot be put, or it may be for uses to which ordinary varieties of building stone can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. Special and distinct value may be reflected by a higher market value in comparison with other stones, but higher market value is not the exclusive way of providing that the deposit has a distinct and special value. It is possible that special economic value of the stone may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stones.

Mining Claims: Common Varieties of Minerals: Unique Property

"Heatherstone," a type of andesite possessing properties of natural fracturing and flat surface cross sectioning, is considered to be unique when no other stone from the market area is shown to have the same characteristics, and witnesses verify the fact that these particular characteristics are peculiar to Heatherstone.

Mining Claims: Common Varieties of Minerals: Unique Property—Mining Claims: Common Varieties of Minerals: Special Value

A building stone's unique properties of natural fracturing and flat surface cross sectioning which reduce the cost of extraction and installation of the stone impart a special and distinct value to the stone through the generation of profits in excess of those which could be realized from a deposit of common building stone.

Materials Act—Mining Claims: Generally

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One whose only interest derives from the fact that he is the holder of a special use permit issued under the Materials Act has only those rights described in the permit, and land covered by such permit is subject to location under the mining laws. The permittee acquires no rights under the mining laws by virtue of his permit and cannot apply for a patent to the land encompassed by his permit.

Rights-of-Way: Generally—Mining Claims: Lands Subject to—Mining Claims: Withdrawn Lands—Withdrawals and Reservations: Generally

Where a state agency holds a Forest Service free use permit to remove mineral materials from designated public land this does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act.

Rules of Practice: Government Contests—Rules of Practice: Hearings

Where a contest complaint makes no charge which refers to a particular matter, and where the Administrative Law Judge states at the hearing that he will confine the proceedings to specific issues which do not include the matter in question, and where, in the course of the hearing, the Judge refused to receive evidence relating to that matter, it is error for the Judge to make a finding as to that matter and employ such finding as part of the rationale of his decision.

APPEARANCES: Donald H. Bond, Esq., Halverson, Applegate, McDonald, Bond, Grahn and Wiehl, Yakima, Washington, for appellant; Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for appellee; Carl B. Luckerrath, Esq., Seattle, Washington, for Intervenor.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Kenneth McClarty has filed briefs in opposition to the recommended decision of the Administrative Law Judge¹ dated September 23, 1971, in which the Judge recommended that McClarty's Snoqueen placer claim be declared null and void because the andesite² found on the claim is a common variety of building stone and therefore not locatable after July 23, 1955, under the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. §§ 601-615 (1970).

John W. Pope submits a brief as Intervenor in this case. Pope appeared as an Intervenor in the hearing contending that at the time McClarty's claim was located he was in possession of a portion of the Snoqueen claim and actively engaged in the production and sale of the stone from the deposit under a special use permit issued by the Forest Service pursuant to the Materials Act of 1947, *as amended*, 30 U.S.C. §§ 701 *et seq.* (1970). Therefore, he contends that a finding that the stone is an uncommon variety must accrue to his benefit. The

¹ The change of title of the hearing officer from "hearing examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

² Andesite is a volcanic rock composed essentially of andesine and one or more mafic constituents. *A Dictionary of Mining, Mineral and Related Terms*, U.S. Department of the Interior (Paul W. Thrush, ed. 1968).

Judge reasoned that this contention could not be supported, because under law, either the stone is a common variety and Pope's permit is valid or it is an uncommon variety and McClarty's mining claim is valid. Insofar as the record reveals, Pope has never located a mining claim on the land at issue.

The Snoqueen placer claim, situated in the Snoqualmie National Forest, Yakima County, Washington, was located on August 1, 1960, for andesite, a building stone. This stone sells under the trade name Heatherstone and is used in both commercial and residential construction. It is used for veneer walls, patios, fireplaces, planters and other purposes.

Common varieties of stone have not been locatable under the mining laws since the enactment of the Act of July 23, 1955, *supra*. 30 U.S.C. § 611 (1970) provides:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however*, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. * * *

The enact of 30 U.S.C. § 611 affected only common varieties but but left the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), entirely effective as to building stone that has some property giving it distinct and special value. *See United States v. Coleman*, 390 U.S. 599 (1968). The pertinent part of this Act provides: "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims." Therefore, in order for Heatherstone to be locatable under the Act of August 4, 1892, appellant must prove that the stone from the Snoqueen claim is valuable because the deposit has some uncommon property giving it such distinct and special value as to distinguish it from the so-called common varieties.

Departmental action against the claim was initiated on April 5, 1961, when the Forest Service, Department of Agriculture, recommended the filing of a complaint alleging that the andesite on McClarty's claim was a common variety and therefore not subject to location. Subsequent to a hearing on the validity of the claim, the Hearing Examiner rendered a decision on March 22, 1962, declaring the mining claim null and void. McClarty appealed to the Director, Bureau of Land Management, and his decision of September 24, 1962, vacated the decision of the Examiner and dismissed the contest. The Forest Serv-

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ice appealed to the Secretary of the Interior, whose decision reversed the Director's decision and remanded the case for reinstatement of the decision of the Examiner. *United States v. McClarty*, 71 I.D. 331 (1964).

On August 24, 1965, McClarty sought judicial review of the Secretary's decision in the United States District Court for the Eastern District of Washington. On May 26, 1966, the Court entered a judgment in favor of the defendant. (*Kenneth McClarty v. Stewart L. Udall*, Civil Action No. 2116, E.D. Wash.) McClarty appealed, and the United States Court of Appeals reversed the summary decision of the District Court and remanded the case to that Court with instructions to enter a judgment remanding the case to the Secretary of the Interior. *Kenneth McClarty v. Secretary of the Interior*, 408 F. 2d 907 (9th Cir. 1969). The Court's decision also suggested that the Secretary vacate the decision of the former Secretary and that the Department conduct further proceedings consistent with the decision of the Court of Appeals. In this decision, at p. 909, the Court found that the Snoqueen deposit was unique because of the naturally fractured regularly shaped stone, but that evidence was sketchy as to whether it had a higher monetary value than other stones. The Court said that the Department might properly conclude that the case should be remanded for hearing for further evidence on the issue of money value.

In *United States v. McClarty*, 76 I.D. 193 (1969), the Assistant Solicitor vacated the earlier Departmental decision and ordered a rehearing in compliance with the Court's opinion. At this rehearing on November 12, 1970, the Administrative Law Judge confined the issue to whether there was a discovery of a locatable mineral. On September 23, 1971, he issued his recommended decision in which he recommended that Heatherstone be found to be a common variety not subject to location after July 23, 1955, and that the Snoqueen placer claim be declared null and void.

The Judge found that although Heatherstone has a unique fracturing characteristic, this characteristic does not give the deposit a distinct and special value either in place or in the market place. He based this finding in part on evidence presented at the hearing that the Forest Service sold Heatherstone to Mr. Pope, the Intervenor, for 50 cents a ton in place. The parties stipulated that Heatherstone sells for \$74 to \$82 per ton on the dealers' lots. (Tr. 75-76.)³ Other stones on the dealers' lots sell from \$40 per ton to \$100 per ton. (Tr. 76-79.) In some cases, the selling price of the stone includes the price of cutting. (See Tr. 30, 72-73, 107-108.) The Judge stated that the real difference in value of one stone over another is not the selling price, but rather the volume of ma-

³ Transcript references in this decision are cites to the transcript of the hearing of November 12, 1970.

terial being sold. The Judge found that the availability of competing sources of stone is so great that competition keeps the retail price within the reasonable range. He also decided that the in-place value of these materials is insignificant.

Regarding the Intervenor's position, the Judge found that if the stone is uncommon now, it always has been, and its sale by the Forest Service was not authorized under the Materials Act of 1947, 30 U.S.C. § 601 (1970). If the stone is a common variety now, it always has been and can be acquired only under the Materials Act. Thus, he concluded, either the mining claim is valid or the special use permit is valid.

Finally, the Judge held that the land was not subject to location by McClarty because of the segregative effect of a special use permit issued by the Forest Service to the State Highway Department.⁴

On appeal, McClarty submits that the contest by the Forest Service should be dismissed and his claim upheld as a valid mining claim located on a deposit of building stone of uncommon variety. Appellant makes the following contentions in his brief:

(1) *The recommended decision of the Hearing Examiner is erroneous in finding that the Snoqueen placer mining claim is a deposit of a common variety*

⁴ At the hearing the Forest Service claimed that a portion of the Snoqueen was within the boundaries of a material site previously granted to the Highway Department of the State of Washington by a special use permit and that any portion of the Snoqueen within the site must be declared *void ab initio*.

building stone and the material thereon (known as Heatherstone) is a common variety of building stone. The test of whether the admittedly unique properties of the Snoqueen deposit give it a special and distinct value as a source of building stone for veneer walls, fireplaces, chimneys, etc. was improperly and unfairly restricted.

(2) *The recommended decision of the Hearing Examiner is erroneous as a matter of law in holding that grant of a special use permit to the Washington State Highway Department withdrew the land covered by that permit from location under the mining laws. The issue of withdrawal by virtue of the grant of a special use permit to the Washington State Highway Department was not within the issues litigated at the time of hearing, November 12, 1970.*

The Forest Service alleges in its reply brief that the Snoqueen deposit's uniqueness is not supported by its price. It also reasserts its contention that a special use permit issued to the Washington State Highway Department withdrew the land covered by the permit from location under the mining laws.

Intervenor contends that the stone is an uncommon variety and that McClarty usurped his rights by locating his claim on the land in question.

The main issue for determination by this Board is whether Heatherstone possesses unique properties giving it a special and distinct value, thereby making it locatable under the Act of August 4, 1892.

According to the evidence in this case, the most unusual and notable characteristics of Heatherstone are its natural fracturing and flat surface cross sectioning. Appellant

contents that these characteristics are unique and impart to Heatherstone a special and distinct value. In order to determine whether this contention is valid, it is necessary to study these properties and the alleged advantages inherent in them.

1. *Advantages in Extracting and Processing Heatherstone.* Mr. Lehman, who is under contractual agreement with McClarty to extract Heatherstone from the Snoqueen deposit, testified at the rehearing regarding the extraction process. He stated that the natural fracturing affects the ease and expense of extracting the stone from the deposit. A gandy dancer bar is used to strike the seam and pry the pieces apart. No blasting is employed and little sorting is necessary. Most of the extracted stone is suitable to be palletized and shipped without further processing. The cleavage makes the material easy to palletize because it is dimensional, and the bed surface of the stone facilitates stacking. No sorting is necessary by the dealers. The material is ready for sale the way it is palletized. Lehman explained that Heatherstone's natural attributes give it an advantage over manufactured or processed stones, saying:

It has a special value over the fact that even manufactured or processed stone, as the Wilkinson stone and the sandstone, the Wilkinson building stone has to be guillotined and sawed, as does the Mount Adams, it has to be guillotined. But it has a much superior built-in characteristics as we do nothing to it. We

do nothing but box a product that's ready for the wall. (Tr. 107.)

Lehman estimated that 70 to 80 percent of the stone in the deposit has cleavage which produces long bars of the material. There are also areas with wider slabs which easily fracture into bars. Lehman said that if it were not for the fracturing characteristic of the material, he would not be mining it. The fracturing is what gives the material its value. (Tr. 85-90.)

Lehman estimated the cost of extracting Heatherstone to be \$5 per ton: \$3 is allotted to labor, \$1 to Caterpillar operation and depreciation, and \$1 for the foreman. The packaging of the material totals \$3.60 and includes \$1.60 per ton for palletizing the material, \$1 for loader expense and \$1 for the operator. Extraction expense (\$5) plus packaging expense (\$3.60) is under \$10. Lehman said that the fracturing characteristic of Heatherstone allows the operation to be accomplished with minimum labor costs. Transportation costs range from \$10 to \$14 per ton within a radius of approximately 150 miles. (Tr. 88-89.)

2. *Advantages in Installing Heatherstone.* Walter Hupp, Raymond Meyers and Chester Dunn, masonry contractors experienced in using Heatherstone,⁵ testified to the advantages in installing Heatherstone. Raymond Meyers testified

⁵ Hupp has used about 800 to 1,000 tons of Heatherstone over an eight year period. Meyers has used about 500 tons of Heatherstone for about two years. Dunn has used about 500 tons over an eight year period.

that Heatherstone has a clear advantage in ease of handling over other types of stone. (Tr. 68.) The three contractors testified that Heatherstone is easy to handle because of the flat beds, running opposite each other. Dunn explained that it is easier to lay because there are more ledges and flat areas on which to spread mortar. The shape of the cross section allows better adherence of the stone to the wall. Consequently, the stone will not "kick out" (fall out) of the wall. (D.-6.) * Basalt, in comparison, is more difficult to handle because it is diamond shaped. The cross section of basalt might be two inches on one side and one inch on the reverse side, thus making it difficult to set one stone upon another. (Tr. 58, 59.)

Meyers and Hupp both testified to the fact that slabs of Heatherstone can be easily broken into bars simply by hitting the slab with a hammer. According to Meyers, it is possible to split a slab into two large pieces because of the fracturing characteristic of Heatherstone. (Tr. 65-66.) Basalt, on the other hand, shatters. Meyers claimed that it is easier to split Heatherstone with a hammer than to split any other volcanic rock. (Tr. 64-65.) Hupp explained that the slabs could be turned up on edge and still have the advantage of the flat beds. (Tr. 42.)

The contractors also offered testimony that better and faster coverage could be achieved by installing

Heatherstone rather than some other type of volcanic stone. Better and faster coverage results in more economic installation. The characteristic flat beds of Heatherstone enable it to be used at labor-saving costs, since it can be installed faster. The process is faster because, after laying one stone, there is a good flat surface on which to lay the next. (Tr. 62-63.) Little fitting is necessary. A customer, therefore, might prefer Heatherstone because it can be installed at a more reasonable cost. (Tr. 53.) Dunn estimated that the cost of installing Heatherstone is \$3.50 to \$3.75 per square foot, while the cost of installing other volcanic stones runs between \$4 and \$5 per square foot. (D. 5-6.) On cross-examination, Meyers was asked about other stones including Wilkinson stone, Arizona sandstone, Sierra Sunset stone, Oregon rainbow, LaGrande, and Featherstone, and he replied that of all the stones that he had used in the past ten years, Heatherstone is the most economical to put up. (Tr. 68, 69.)

As for coverage, Meyers estimated that one man could put up 100 square feet of Heatherstone in the same amount of time as another could install 75 square feet or less of basalt. (Tr. 66-67.) Dunn compared coverage of Heatherstone with coverage of other stones in the same amount of time. With ordinary volcanic building stone, Dunn estimated that the coverage would be about 50 to 75 square feet per ton per day for one worker, while the coverage with Heather-

* "D" refers to the deposition of Chester Dunn taken on November 20, 1970.

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stone would average about 150 square feet per day for a worker. One man can put up 75 square feet of Travertine per day as compared with 150 square feet of Heatherstone. (D. 4, 5, 9.) About the same comparison is true between Glacier Green and Heatherstone, and Blue Ice and Heatherstone. There would be less coverage with driftwood in the same amount of time. Coverage with sandstone would be slower because it is necessary to clip the ends accurately. Dunn said that Heatherstone can be put up faster than any stone that must be sawed and sized. (D. 8-10.)

Dunn referred to one of his building projects to illustrate the savings in labor by using Heatherstone: Dunn bid a job on a Bavarian restaurant where the owner agreed to furnish Black Basalt at the owner's cost. Subsequently, Dunn decided to substitute Heatherstone for Black Basalt and pay for the Heatherstone himself. He still did the work for the price that he bid. His workers were able to lay twice as much Heatherstone as they would have been able to lay with ordinary volcanic stone in the same amount of time. (D. 3-5.) The time on this job was cut in half by using Heatherstone. Dunn saved 12 days of labor in order to "come out even." (D. 14-19.)

Regarding coverage per ton of the material, Dunn testified that one ton of Heatherstone will cover 65 to 70 square feet whereas one ton of rubble rock will cover only 50 square feet. There is better cov-

erage with Heatherstone because volcanic rock is thicker than Heatherstone (five to seven inches as compared to three and one-half inches). (D. 28.) Hupp testified that it take one and one-half times as much basalt as Heatherstone to do the same job. (Tr. 59.)

There was testimony to show that greater height could be reached on a wall in a working day with Heatherstone than with other stones. Dunn contended that there is no limit to how high you can go with Heatherstone because Heatherstone sets up better in the mortar and with the ledge effect the material is tied back to the wall. Because of the good bed joints, it is not necessary to stop the job and wait for the mortar to dry. The higher you go on a wall, the more advantageous it is to use Heatherstone. With other types of rubble, you slow down production after you pass five feet. (D. 8.)

Lehman explained that low wastage, another advantage in using Heatherstone, is attributable to its fracturing. With Heatherstone, every stone can be used, unlike other materials where there is waste. (Tr. 87.)

McClarty has also attempted to show through the witnesses that the advantages of installing Heatherstone are not lost when the mason wishes to create an irregular jagged rough effect as opposed to a smooth, uniform effect. Hupp testified that the shape of the cross sections makes it easier to get an irregular effect with Heatherstone than with

other stones. (Tr. 45.) Cost and labor advantages are the same when creating an irregular effect as when achieving a uniform effect. Meyers added that it was much easier to work irregular walls with Heatherstone than with other stone due to

the cleavage joining characteristics. (Tr. 67-68.)

We now turn to a price comparison between Heatherstone and other stones. At the rehearing, there was a stipulation (Tr. 75-79) as to the following prices of stone:

	1957	1967	1968	1969
Wholesale price per ton:				
Basalt-----	\$15			\$20
Heatherstone-----	45	\$45	\$54	54
Camas-----		10	20	
Retail price per ton:				
Selected basalt-----				50-54
Heatherstone-----		65	84	74-82
Camas-----		30	40	

The following is a comparison in retail prices between Heatherstone and competitive stones of different origin for 1969:

	<i>Per ton</i>
White Travertine-----	\$64
Other Travertine-----	\$58
Glacier Green-----	\$77
Renatta-----	\$72
North Port-----	\$64
Blue Ice-----	\$75
Driftwood-----	\$66
Ariz. Sandstone-----	\$70

Appellant claims that the only stones in competition with Heatherstone in the market area are basalts, selected basalts and related stones, and Mount Adams stone. Mount Adams stone, at \$75 is the highest price of this group. Since Heatherstone is priced between \$70 and \$82 per ton, Mount Adams stone merits a higher price in some instances. Although it may command a higher price than Heather-

stone, Arthur Ritchie, a geologist for the State Highway Department, testifying on behalf of McClarty, explained that Mount Adams stone is not suitable in its natural state for veneer for walls and similar uses as a building stone. It could be made suitable for walls but this would entail an extra step. By contrast, Heatherstone is suitable for such purposes in its natural state.

On the issue of uniqueness, the Forest Service offered evidence to show that andesite having the uniform fracturing characteristic is fairly prevalent in the Cascades. Raymond Shirley, a mining engineer employed by the Forest Service, testified that he had seen similar deposits to the deposit on the Snoqueen claim. Since the first hearing, two new deposits have been found in the vicinity: Mount Adams

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and Trillium Lake. The Mount Adams stone has essentially a vertical fracture and a uniform thickness throughout. Mount Adams stone comes in sheets rather than two by four bars⁷ like Heatherstone. Shirley admitted that the Mount Adams stone does not look like appellant's, but he said he offered it because of its comparable market value (\$75 per ton). Trillium Lake stone has a two by four structure which is similar to Heatherstone but has not yet been developed to the point at which one could say it was equivalent to Heatherstone. (Tr. 28.) He could not say whether this deposit has a predominance of the cross section jointing. Shirley testified to the fact that the Trillium Lake deposit has not been opened up, and there was no quarry operation in process there at the time of the hearing. (Tr. 34-35.) (Contestee's brief, p. 11.)

Concerning the uniqueness of Heatherstone, Hupp testified that he did not know of any other lava or volcanic material used in the business that has Heatherstone's fracturing characteristics. (Tr. 44.) Meyers stated that Heatherstone's cross section makes it advantageous to use Heatherstone and that he was not aware of any other lava or volcanic building stone that characteristically has that kind of cross section. (Tr. 63-64.)

Having reviewed McClarty's contentions as to the distinct and spe-

cial economic values attributable to the unique physical characteristics of Heatherstone, we must now consider whether the material is an uncommon variety and thus locatable under the mining laws.

In *McClarty v. Secretary of Interior, supra*, the Court of Appeals reviewed the criteria established by the Department in *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968), for determining the difference between a common and uncommon variety of stone. These guidelines, as discussed at 908, are as follows:

* * * (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

The Court of Appeals, however, in its review of this case, explained "value" by indicating that price cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit. The Court discussed other possibilities for determining value at 909:

* * * [I]n the *McClarty* case, where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct

⁷ Shirley apparently has reference to the respective dimensions of two adjacent sides of the stone "bar" produced; i.e. 2" x 4", as the description commonly applied to lumber dimensions.

and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stones. It is quite possible that the special economic value of the stone would be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stone. * * *

In applying these guidelines to the facts in the present case, the Court found the Snoqueen deposit to be unique. We agree. Our determination of uniqueness is based on the testimony of Hupp and Meyers that they did not know of any other stone having the same inherent properties as Heatherstone which enable it to be readily usable for construction. Raymond Shirley testified on behalf of the Forest Service that he had seen deposits similar to the deposits on the Snoqueen claim. He offered the Mount Adams deposit as an example, but admitted that this deposit did not have the two by four fracturing characteristic of the Snoqueen. As for the Trillium Lake deposit, Shirley said that the claim had not "opened up" as of the date of the hearing. No other example of stone possessing the properties of natural fracturing and flat surface cross sections was offered into evidence.

We note that the Forest Service takes exception to McClarty's contention that the property is unique because this particular type of fracturing exists in an unusually large quantity on his deposit. We agree that quantity is not a unique property inherent in the de-

posit, but only an extrinsic factor. *United States v. Stewart*, 5 IBLA 39, 79 I.D. 27 (1972). Therefore, we recognize the fact that the Snoqueen deposit contains a large quantity of this stone, but our finding of uniqueness is not based on this point. Moreover, the issue of unique properties is not before us, having been decided by the Court of Appeals, which specifically held that the stone was unique.

The only facet of the guidelines enumerated in *U.S. Minerals Development Corporation, supra*, that remained unsettled was the question of value, and the Court therefore remanded the case to the Department for further evidence on this issue.

Since the *U.S. Minerals Development Corporation* decision, a number of cases have been decided which invalidated claims and reiterated the principle set forth in *U.S. Minerals Development Corporation* that a unique property imparts a special and distinct value by commanding a higher price on the market. Among these cases are *Atchison, Topeka and Santa Fe Railway Company v. Cox*, 4 IBLA 279 (1972); *United States v. Lease*, 6 IBLA 11, 79 I.D. 379 (1972); *United States v. Rogers*, A-31049 (March 3, 1970); *United States v. DeZan*, A-30515 (July 1, 1968).

Differences in the chemical composition or physical properties were held to be immaterial if they did not result in a distinct economic advantage of one material over another. *United States v. Thomas*, 1

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IBLA 209, 78 I.D. 5 (1971); *United States v. U.S. Minerals Development Corporation, supra*; *United States v. DeZan, supra*.

Following this higher market value concept, in *United States v. Chartrand*, 11 IBLA 194, 80 I.D. 408 (1973), the Board reached the opposite result by holding a mining claim valid on the basis that the stone in question was an uncommon variety. In this case, appellant was able to demonstrate that his stone possessed a unique coloration characteristic which definitely translated itself into a higher market price when compared with other stones.

From the facts presented we find that while the price per ton of Heatherstone is not significantly higher than other stone used for the same purposes, its unique qualities do impart definite economic advantages over other competitive types of stone. Heatherstone is cheaper by half to quarry and prepare for market, resulting in significantly higher profits to the quarry operator. (Tr. 108.) It yields a greater volume of usable stone per ton and the same volume of usable Heatherstone covers a broader area, which means that fewer tons of Heatherstone are required for a given job, thereby effecting a significant saving to the builder. A mason can lay a substantially broader area of Heatherstone in a day's work, which affords a definite economic advantage to the masonry contractor. Where the wall exceeds

five feet in height this advantage is further enhanced.

The finding that Heatherstone's unique properties impart special economic advantages does not hinge on the advantages in quarrying alone, but also on the economic advantages in installation that may be appreciated by the contractor, stonemason and customer.

The dissenting opinion questions whether a special and distinct value which accrues to the user of the stone is within the ambit of the Court's guidelines. Regardless of whether it is or is not, our finding of special value to the builder, contractor or subcontractor is not essential to the conclusion. There is an established special value to the producer, reflected by reduced costs of overhead so that the producer's profit is substantially increased, and this is attributable to the uncommon physical properties of the stone. This, of itself, is sufficient to meet the Court's criterion for determining whether the stone has a special economic value.

We do not agree with the Administrative Law Judge's statement that volume of material sold rather than the selling price determines the real difference in value between the stones. The rule for determining whether a material used for the same purposes as common varieties of similar materials as set forth in *United States v. U.S. Minerals Development Corporation, supra*, was to determine whether it commanded a higher price than other such ma-

terials in the area. *See also United States v. DeZan, supra, United States v. Rogers, supra.* Comparison of materials on a "per unit" basis is inherent in this rule. If a comparison of the value of materials were not based on a "per unit" basis, then it might be said that coal could be considered more valuable than gold based upon the respective volumes produced and sold.

Disposition of the Intervenor's contention remains unresolved. In his brief submitted on appeal, Pope alleges that it is not possible to qualify a rock as having some property giving it distinct and special value, under the "Common Varieties Act," until it has been possible, in the open market place, to demonstrate both its distinct features and its special value. Intervenor contends that until these have been demonstrated, it is premature to attempt to undertake a location, and while a prospector is in "pedis possessio" seeking to establish or create that identification, it is in violation of such prospector's possessory rights to permit usurpation by a stranger.

Pope's only demonstrated interest in the property in question was by virtue of a special use permit issued to him by the Forest Service under the Materials Act, *supra*. This statute, however, provides that the only material which may be sold under its authority is that which is not subject to disposal under other statutes, especially referring to "the United States Mining laws." § 601, *supra*. McClarty, locating a claim

in accordance with the mining laws, was rightfully on the property.

Intervenor's contention that a location is premature until special and distinct value has been demonstrated in the market place is without merit. Demonstration of special and distinct value in the market place relates to proving whether or not a stone is an uncommon variety. If a stone possessing a unique property does therefore command a higher price in the market when compared with other stones, or enjoys some other special economic value based upon its unique quality, it is an uncommon variety and has probably always been an uncommon variety. Therefore, it is locatable under the mining laws and is not the proper subject for a special use permit.

Applying the same reasoning, Pope's assertion that he was marketing the stone with the intention of proving it to be an uncommon variety cannot be sustained. A permit issued under the Materials Act may only be issued for common varieties of stone. Having been granted this permit, Pope cannot now assert that he is attempting to locate an uncommon variety of stone under the general mining law. Pope has not followed the procedures under the mining laws for locating a mining claim, and therefore he may not claim the benefits which these procedures afford. In addition, Pope's occupation of the land by reason of having applied for and accepted the permission of a federal agency is inconsistent with his con-

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tention that he was occupying the land under a right of possession and inchoate title.

Furthermore, we have limited jurisdiction in regard to adverse claims. 43 CFR 3871.3 provides that the question of right of possession to a mining claim between rival claimants is within the jurisdiction of the court. While perhaps not dispositive of the question, we observe that McClarty has procured an injunction from the Washington Superior Court for King County, Cause No. 583163, restraining Pope from access to the area.

We disagree with the Administrative Law Judge's finding that the alleged granting of a special use permit to the Washington State Highway Department circa 1950 withdrew the land covered by the permit from location under the mining laws. We note that this issue went beyond the scope of the issues to be considered in the hearing as delineated by the Administrative Law Judge, and as suggested by the Court of Appeals. Moreover, we note that the Contestant's brief in support of the Judge's recommended decision states, "the Hearing Examiner refused to receive evidence on the permit issue." The third charge in the Government's complaint of April 5, 1961, reads as follows:

(c) A portion of the land embraced by this claim was on August 1, 1960, appropriated to other uses by the issuance of a special-use permit by the Forest Service. This portion of the land was therefore not locatable at the time this claim was located.

This charge does not specify a permittee. All briefs filed in the early years of proceedings discuss the permit issued to Pope on June 23, 1960, rather than the one allegedly issued to the State Highway Department. 43 CFR 4.450-4(a)(4) requires that the complaint contain a statement in clear and concise language of the facts constituting the grounds of the contest. It must give notice to the adverse party of the claims that are to be adjudicated so that he may prepare his case. *United States v. Harold Ladd Pierce*, 3 IBLA 29 (1971); *Douds v. International Longshoremen's Ass'n.*, 241 F. 2d 278, 283 (2d Cir. 1957). The charge in question is vague and even misleading, since there are two possible permittees, although the date of the permit referred to in the charge would seem to preclude any intention to invoke the permit issued ten years earlier. Such a charge is not proper notice to appellant on the State Highway permit issue and is therefore not a proper basis for decision. A ground not alleged in a contest complaint cannot be used to find a claim invalid, unless it has been raised at the hearing and the contestee has not objected. *United States v. Northwest Mine and Milling, Inc.*, 11 IBLA 271 (1973); *United States v. Harold Ladd Pierce, supra*. We therefore conclude that it was error for the Judge to make a finding with respect to this issue and then to employ such finding as part of the rationale of his decision.

The Secretary of Agriculture is not expressly or impliedly authorized to withdraw unimproved national forest land from mining location. *United States v. Crocker*, 60 I.D. 285 (1949). See *A. W. Schunk*, 16 IBLA 191 (1974). General withdrawal authority is vested solely in the Secretary of the Interior by delegation of the power of the President. 43 U.S.C. §§ 141-142 (1970); Executive Order No. 10355, May 26, 1952; *A. W. Schunk*, *supra*. The Secretary of Agriculture, or any of his subordinates may not simply assume this authority without a similar delegation from the President. There have been cases, of course, in which there has been a proper withdrawal of land from location under the mining laws by means other than an Executive Order or a Public Land Order. For example, a withdrawal may be made pursuant to a statute or regulation. *J. M. Keeney*, A-28856 (August 6, 1962); *United States v. Schaub*, 103 F. Supp. 873 (1952); *Marion Q. Kaiser*, 65 I.D. 485 (1958). In the absence of a formal withdrawal, the extent of an appropriation of lands by the Government for a valid federal use is determined by the extent of the improvements and actual use and occupancy of the land for such purposes. *A. J. Katches*, A-29079 (December 4, 1962) and cases cited therein; *United States v. Schaub*, *supra*; cf. *United States v. Crocker*, *supra*; *Instructions*, 44 L.D. 513 (1916), see also *Right of Way—Forest Reserves—Jurisdiction*, 33 L.D. 609 (1905).

Withdrawal by statute and appropriation by use and occupancy were both discussed in *United States v. Schaub*, *supra*, the case upon which the Administrative Law Judge relied in deciding that the alleged grant of a special use permit to the State Highway Department withdrew the land from location under the mining laws.

We find that the facts in *Schaub* must be distinguished from the facts in this case. There is no special use permit to the Highway Department in evidence in the record of this case. Neither was there evidence to show that improvements have been placed on the area in question, nor was there any proof that the material had been actually put to use by the Highway Department (although the permit is said to have issued in 1950), nor did it prevent issuance of a special use permit to Pope in 1960 which expressly authorized Pope to mine rock from the same land covered by the permit which had been issued to the Highway Department. The Judge apparently was not of the opinion that the land was closed to mining location as a consequence of the special use permit given by the Forest Service to Pope, although he does not explain why one Forest Service permit should have a segregative effect on the land while another does not. Furthermore, we note that 48 U.S.C. § 341, now 16 U.S.C. § 497a (1970), under which the special use permit was issued in *Schaub* was peculiar to Alaska, and not applicable in the State of

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Washington. The *Schaub* decision also alludes to 23 U.S.C. § 317, which is the statute authorizing the granting of rights-of-way for materials sites for Federal-aid highway construction.

In any event, a special use permit issued to a governmental agency for the free use of material (unlike a material site right-of-way issued pursuant to the Federal-Aid Highway Act⁸) does not create a withdrawal of the land or serve to segregate the land from appropriation under the mining laws. VI BLM 4.6 states:

GOVERNMENTAL UNITS

A. Free-use permits may be issued to any Federal or State agency, unit, or subdivision, including municipalities without limitation as to the number of permits or value of materials upon a satisfactory showing that such materials will be used for public projects. Such permits will constitute a superior right as against any subsequent claim to or entry of the lands *except that a permit does not segregate the land from location under the mining laws if the minerals in fact, are subject to location or the lands contain other locatable minerals subject to location* (See section .2C). Permits to governmental agencies may be issued for such periods as are deemed appropriate, but may not exceed 10 years. (These permits are preferable to right-of-way material sites under section 17 of the Federal-Aid Highway Act). (Italics added.)

See also 43 CFR 2920.6. It follows that if issuance of such a permit by BLM does not segregate the public

land involved from location of mining claims, the issuance of a similar permit by the Forest Service could not effect a withdrawal, absent some specific statutory authority⁹ or formal withdrawal action, which has not been shown in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of the Administrative Law Judge is not adopted and the contest is dismissed.

EDWARD W. STUEBING,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

Judge Holt's decision rested upon a finding that the stone deposit involved in this case is a common variety not subject to the mining laws. I agree with the majority to the extent of not accepting the Judge's recommended decision and of concluding that there is a deposit which should now be deemed an uncommon variety of stone within the meaning of the Surface Resources Act, 30 U.S.C. § 611 (1970), under the test set forth for this case in *McClarty v. Secretary of the Interior*,

⁸ Act of November 9, 1921: 42 Stat. 212, 216, 23 U.S.C. § 317. See *Solicitor's Opinion*, M-36554 (March 24, 1959); *Sam D. Rawson*, 61 I.D. 255 (1953).

⁹ For an example of Forest Service special use permits which have been given segregative effect by statute see the Act of February 14, 1931, 46 Stat. 1115.

408 F. 2d 907, 909 (9th Cir. 1969), and based upon the present state of the evidence in the record. I do not, however, agree with certain other aspects of the majority's decision.

In reaching the conclusion that the deposit is an uncommon variety of stone, the majority greatly emphasizes testimony by stonemasons that Heatherstone is easier and more economical for them to install, implying that reduced costs for stonemasons is a legitimate factor in determining whether the stone has a special and distinct value. Although some language in the Court's opinion in *McClarty* may give such an impression, a more careful analysis of the decision compels the conclusion that such evidence would only be relevant to the market value of the product and, at most, to whether the quality of the stone would increase the demand for the stone at the quarry so that the producer of the stone at the quarry would increase his profits. The Court in *McClarty* concluded that the stone deposit had a unique property in that it was naturally fractured into regular shapes ready for use by the stonemason with little, if any, cutting or shaping required. The Court also indicated that it would be proper for the Department to remand the case for further evidence on the issue of economic value to ascertain whether there was a special and distinct value, as had been done in *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127 (1968). To determine whether a deposit is an uncommon

variety as defined by Congress to "include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *," the Court made certain suggestions. First, it stated that one aspect of the test enunciated in the *Minerals Development* case, namely, a price comparison with other materials, "cannot be the exclusive way of proving that a deposit has a distinct and special economic value attributable to the unique property of the deposit." 408 F. 2d 909.

Second, the Court suggested with respect to the *McClarty* claim:

* * * where the unique properties of the stone are the natural fracturing into regular shapes and forms suitable for laying without further fabrication, the distinct and special economic value of the stone may or may not be measurable by the retail market price in comparison with the price of other building stones. It is quite possible that the special economic value of the stone would be reflected by *reduced costs of overhead so that the profit to the producer* would be substantially more while the retail market price would remain competitive with other building stone. * * * [Italics added.]

Id. The italicized portion of the quotation indicates another input into the equation of determining a distinct and special value as to the *McClarty* claim. Under this suggested test, the stone may have a price competitive with other building stone. However, it is essential to compare the economics of the claimant's quarrying operation with that of other stone producers' operations to ascertain whether the

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claimant is, in fact, making a greater profit for his stone than other stone producers for reasons attributable to the unique property of the deposit. The Court stressed it is not the fabricated product which should be compared but the nature of the deposit itself. The profitability to the producer of the stone from the deposit must, therefore, relate to the quarry owner or operator—the producer of the stone—not to the profitability of an artisan who uses the material in his work. To determine the profit to the producer we are not concerned with how much profit a mason who buys the stone can make in his work by using one stone over another except insofar as testimony by a mason would show a demand for the stone in the marketplace. Although a stonemason could be an operator of a quarry, usually the mason is several business transactions away from the producer. Often he is hired to lay stone after a builder or other consumer has already purchased the stone from a wholesaler—generally a dealer in stone and other building products. The dealer in turn has purchased the material from a quarry operator or taken the material by consignment. It is possible that masons may buy directly from a quarry operator if they have a job where they may select the materials. If the stone has a special advantage to masons as consumers, this in turn should be reflected by a difference in the price they, as consumers, would pay for the product in com-

parison with other available stones, or would so increase the demand for the stone that the quarry operator might be able to operate more profitably because of reductions in his overhead and costs in relation to production from the quarry in comparison with other quarry operators.

I cannot attribute to the Court a ruling that we compare the economics of stonemasons—the artisans who use the material—but that we compare the economics of the producers of the stone. To the extent the majority indicates or implies that the testimony of the stonemasons has any relevance other than as showing the marketability of the stone and how that might affect the profitability of the producer, as I have indicated, I disagree.

Under the Court's suggested test that reduced overhead costs may give a producer a substantial profit over other producers, very difficult evidentiary problems are created. If a truly valid comparison of the profitability of producers is to be made, there should be evidence comparing the cost operations of many quarry operators with evaluations and adjustments made to reflect cost and overhead differentials due to the unique property of the deposit and due to other factors unrelated to the unique property, such as differences in labor costs resulting from other economic and geographical factors and transportation costs from the quarry to the market. *See United States v. Bed-*

rock Mining Co., 1 IBLA 21 (1970), and cases cited therein. The Court's directions regarding this test control our application of the test to the question of common or uncommon variety in this case. Before extending this test to other cases, however, a more thorough consideration should be given to it not only because of the difficult evidentiary problems it creates both for the claimant and the United States but also to ascertain whether it is in accord with the intent of Congress, as reflected in the legislative history of the Surface Resources Act.¹

¹I note that the decision of the United States Circuit Court for the 9th Circuit overturning a lower court and a previous Department decision was rendered without any briefing by the United States on the question of the criteria for determining common or uncommon varieties of stone. Counsel for McClarty presented an extensive brief to the Court suggesting the test and raising other issues. The United States responded with a summary brief indicating that the case would be governed by the Supreme Court's ruling in *United States v. Coleman*, 390 U.S. 599 (1968), which was then pending. The Court delayed its decision until the Supreme Court's decision in *Coleman* issued. The *Coleman* decision did not go into the issue of what constitutes a common or uncommon variety of stone other than to refer to the language of the Surface Resources Act. Because the Government did not respond to McClarty's suggested test, the difficulties inherent in that test were not pointed out to the Court in writing and may explain some of the apparent difficulties in the Court's opinion.

This Department in another case has preferred not to follow the Court's test in *McClarty* on the ground it did not believe Congress intended that ordinary sand, gravel, and stone, etc., which is indistinguishable from other ordinary sand, gravel, stone, etc., should be subject to mineral location merely because a deposit of it can be mined more cheaply than other deposits. *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 346 (1969). That position is in accord with an earlier decision where a deposit of sand and gravel could be sold at a lower overhead because expensive

The evidence in the record concerning a comparison of profitability in the operations of stone producers is meager. The only comparison of costs and overhead of the producers due to the unique property of the deposit was made by Burton A. Lehman who has an interest in the claim. He indicated that the Mount Adams stone, which a Government witness had testified was similar to the Heatherstone in the retail market place, costs \$22 a ton to quarry, whereas the Heatherstone costs \$5 to quarry. (II Tr. 108.) This is a rather substantial difference, assuming the difference is all attributable to the unique fracturing of the Heatherstone deposit. The parties also stipulated, as the majority has set out, to the retail and the wholesale prices of certain stones. Such evidence showed the price of Heatherstone to be comparable to that of certain other building stone in the retail market, presumably stone which is deemed a common variety though considerably less than stone such as Georgia marble. It showed the Heatherstone commanded a significantly higher wholesale price than basalt, a common variety of building stone in the area. There is insufficient evidence in the present record to find under the Court's test in this case that the deposit is a common variety.

processing was unnecessary, but the Department ruled the deposit was a common variety. *United States v. Henderson*, 68 I.D. 26 (1961). I believe those rulings more truly reflect the intent of Congress than the Court's ruling in this case.

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If the question of common or uncommon variety were the only question in this case I would dismiss the Government's complaint. There are, however, additional problems.

This case illustrates the dilemma for a prospective mining locator, a permittee or purchaser of materials, and the Departments of Agriculture and the Interior in deciding whether a given deposit of stone is a common variety which is subject to sale under the Materials Act of July 31, 1947, *as amended* by the Surface Resources Act of 1955, 30 U.S.C. §§ 601-04 (1970), or is an uncommon variety still locatable under the mining laws, 30 U.S.C. § 22 *et seq.* (1970), including building stone under the Act of August 4, 1892, 30 U.S.C. § 161 (1970).

At the first hearing in this case, Arthur Ritchie, a geologist for the State Highway Department, and a witness for the contestee, testified about the State's development of the area as a site for materials for highway construction. (I Tr. 129-133.) He did not give exact dates but it is clear that this was prior to the location of McClarty's claim. At the second hearing John W. Pope was allowed to intervene. Offers of proof by Pope were rejected by the Administrative Law Judge after objections by counsel for contestee. These offers were to present proof that the mining claim boundaries did not encompass certain workings but that the claim did conflict with workings developed by Pope from 1950 through 1961 under use permits

from the Forest Service. (II Tr. 15, 21, 22, 120-28.) Offers of proof by the contestant that the claim boundaries did not conflict with Pope's prior area of use but did conflict with the State's use area were also rejected. (II Tr. 20, 128.)

Part of the rationale of the Judge in rejecting Pope's offers of proof was based upon an understanding that such evidence could be submitted in a subsequent hearing relating to a private contest initiated by Pope against the McClarty claim. However, soon after this hearing, Pope's private contest complaint against McClarty and Burton A. Lehman was dismissed by a decision of the Oregon State Office, Bureau of Land Management, dated December 28, 1970, for failure of the contestant to show he was qualified to contest the claim as one claiming adverse title or interest in the land, and other procedural reasons. Pope has appealed from this decision. (IBLA docket no. 71-174.) It is evident that Pope's offer of proof does raise a question of where the boundaries of McClarty's mining claim are in relation to the deposit that McClarty contends is an uncommon variety. This is a matter of sufficient importance that the validity of the claim should not be decided in this case until the question is resolved. Another problem concerns the effect of the prior permitted use and whether it conflicts with McClarty's claim.

I cannot agree with the majority's restrictive view of the scope of inquiry into questions relating to this

mining claim apart from the issue of common or uncommon variety. This Department has recognized, upon a remand from a court for further evidentiary proceedings, that all evidence which relates to the validity of a claim may be considered. *United States v. Estate of Alvis F. Denison*, 76 I.D. 233 (1969). I see nothing in the Court's decision, including its statement remanding the case for further proceedings "not inconsistent" with its opinion which would preclude inquiry into essential matters affecting the validity of a claim. *McClarty v. Secretary of the Interior*, 408 F. 2d 907, 910 (9th Cir. 1969). For instance, it has long been recognized that if land was not open to mining location when a mining claim was located, a mining claim may be declared void ab initio without the necessity of a hearing. *United States v. Consolidated Mines and Smelting Co., Ltd.*, 455 F. 2d 432 (9th Cir. 1971); *Dredge Corp. v. Penny*, 362 F. 2d 889 (9th Cir. 1966).

Surely nothing in these proceedings could restrict the authority and duty of the Department of the Interior to ascertain whether the claim was located on land open to mining location or indeed to ascertain whether the claim boundaries do include the allegedly uncommon varieties of stone deposits. Otherwise, mistakes and neglect of Governmental officials would confer rights contrary to the law. We are under an

obligation to assure that this is not done. *See, e.g.*, 43 CFR 1810.3.²

I also disagree with the majority's overly broad statement to the effect that if a stone is an uncommon variety it "has probably always been an uncommon variety" and thus disposable only under the mining laws. In any determination of the value of a mineral deposit there are variables which may compel that a given deposit is valuable at one time but may not be valuable at a different time. Thus, in applying the prudent man test of discovery, it has been recognized that changes in market demand or other economic circumstances may cause a discovery to be lost because of the change in value of the deposit. *United States v. Estate of Alvis F. Denison*, *supra*; *Mulkern v. Hammitt*, 326 F. 2d 896 (9th Cir. 1964).

The concept of value is under even a sharper focus in applying the statutory test for determining whether a deposit of stone is an uncommon variety because of its "special and distinct value." Under the Court's test in this case it is apparent that the value to the producer could easily be affected by changes in the market place or by technology or other factors which might change the overhead. Could it then be said that the material remains an uncommon variety under

² In suits by the United States to protect a public right or interest, laches or neglect of duty on the part of a public official has not been a valid defense. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

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the Court's test even though the producer would not retain his economic advantage? I do not think so.

Because a determination of "special and distinct value" necessarily compels a consideration of factors which might fluctuate in time so as to affect a determination made at different times, the dilemma for the quarry man and for the government administrator is enhanced. If a prudent person could not ascertain from existing facts whether a given deposit of stone has a distinct and special value, is it proper to imply, as does the majority, and as did the Administrative Law Judge, that the Government unlawfully issues a permit for sale or free use of such stone under the Materials Act? The majority strongly suggests that because the Materials Act does not authorize the sale of uncommon varieties of materials locatable under the mining laws, a permit issued for common varieties of materials cannot affect the status of the land in any way as to subsequently located mining claims. The majority reaches this conclusion as to permits issued by the Forest Service by emphasizing that the Secretary of Agriculture is not the authorized officer to make withdrawals of land and by referring to a Bureau of Land Management Manual release pertaining to free use permits.

The correct focus of the problem in this case is not to be made by looking to the authority to make withdrawals of the public land or by looking to BLM Manual re-

leases which do not have the effect of law. We are not concerned here with whether there has been a permanent withdrawal of the land barring mining claims, but what effect two different permits issued by the Forest Service may have had upon a subsequently located mining claim for the same land. To some extent raising this issue is premature because the Judge did not permit evidence regarding the permits to be introduced at the hearing. The majority recognizes that if the permit to the state for a material site were made under the Federal-Aid Highway Act, 23 U.S.C. §317 (1970), the land within that site would be segregated from appropriation under the mining laws while the permit is effective. See cases cited in majority opinion and *Carl M. Shearer*, A-30838 (December 21, 1967). If the permit in this case were in fact under that Act, I submit the majority's conclusion that it is too late to consider that fact without bringing a new contest because it was not specifically charged in the complaint is clearly erroneous. See my previous discussion of the authority of this Department to consider matters which would affect the validity of a claim.

If the state material site permit was a free use permit made under the Materials Act, as the testimony of Mr. Ritchie tends to indicate (although we do not know as the permit is not in the record) is the state's right lost as the majority implies when the mining claim is located? The state has not been made a party

in this proceeding. I suggest before this Board rules definitively upon the rights of the mining claimant as to lands which may be in conflict with the state's permit, that the state be invited to intervene and the facts concerning the permit be made of record.³

I have previously indicated that Pope's offer of proof concerning the location of the boundary of the McClarty claim should have been permitted to assure that the particular deposit having the unique property is within the claim. I would also defer a final ruling upon the possible effect of Pope's permit upon the sub-

sequently located claim until the record is complete in this matter.

I suggest that the majority's decision is also overly broad in its discussion of "special use permits" issued by the Forest Service. The question in this case should be limited to a permit or sale under the Materials Act. Although there has been some mislabeling and use of the term "special use permit" in these proceedings, this inartistic use of the term should not be used as a tool to forge rules broader than the actual facts. Generally the term should be limited to permits which are not made under specific statutory authority for specific uses. The Department of the Interior regulations designate "special use permits" for "special purposes not specifically provided for by existing law." 43 CFR 2920.0-2. *Cf.* 36 CFR 251.1(a)(1) relating to the Forest Service use of the term. Regulation 43 CFR 2920.0-2 cited by the majority has no applicability here as it pertains only to special use permits issued by the Department of the Interior, for a purpose not specifically provided by law, and not to sales—negotiated or by competitive bidding—or free use permits under the Materials Act.

It is possible that within a given area there may be deposits of common and uncommon varieties of material intermingled. If a sale or permit for an uncommon variety has been made before a mining claim is located embracing the area, I cannot see how a subsequent mining claim can terminate that contract as

³ A regulation of this Department, with regard to the effect of free use permits to governmental units under the Materials Act, provides in part:

"* * * Such permits will constitute a superior right to remove the materials and will continue in full force and effect, in accordance with its terms and provisions, as against any subsequent claim to or entry of the lands."

43 CFR 3621.2. To the extent the BLM manual provision quoted by the majority conflicts with this regulation it is in error, as the manual release is merely an intra-Departmental instruction without the force and effect of law which a duly promulgated regulation has. This regulation at least reserves the right to remove the common variety mineral materials to the governmental permittee after subsequent claims or entries of the lands are made. I would suggest that to the extent this regulation promulgates a rule affecting mining claims, it may have applicability to similar permits issued by the Forest Service. See section 1, ch. 2 of the Forest Organic Act of June 4, 1897, 16 U.S.C. § 482 (1970). Note that the Materials Act, 30 U.S.C. § 601 (1970), authorizes the Secretary—of the Department of the Interior or Agriculture, as the case may be—to promulgate rules and regulations for the disposal of the materials. I am unaware of any specific regulation promulgated by the Secretary of Agriculture regarding the effect of its permits upon subsequently located mining claims. *Cf.* 36 CFR 251.12. *But see* Forest Service Manual § 2811.25 stating the Forest Service position that lands "occupied or used under a term special-use permit are withdrawn from location and entry."

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to the common variety minerals in the absence of specific regulatory or contractual provisions.⁴ The general rule of law that prior contracts prevail over subsequent contracts to another party should be applicable to successive governmental contracts or grants. Otherwise, there would be a failure of consideration upon the part of the Government and a breach of contract.⁵

The problem is more complex and troublesome where we are concerned with the same deposit rather than intermingling deposits of common and uncommon varieties.

⁴ Note that regulation 43 CFR 3601.3 of this Department provides that subsequent appropriations of land covered by a materials sale contract, including mining locations, are subject to the outstanding contract of sale and the purchaser has the continuing right to remove the materials until termination of the contract.

⁵ On this point the following discussion concerning other statutes is of interest:

"* * * Congress cannot be presumed to have authorized the granting of rights which shall be subject from the date of the grant to being defeated at any time by the provisions of a prior act, at least in the absence of a clear intent to do so. On the other hand, the issuance of an oil and gas lease pursuant to a direction of law binds the Secretary to an obligation of contract which cannot be avoided without proper cause. See *United States v. Bank of the Metropolis*, 14 U.S. (15 Pet. 377, 392) 114 (1841) and *Perry v. United States*, 294 U.S. 330, 352 (1935). It is believed that the 1920 [Mineral] Leasing Act was intended and did modify the 1914 Act to the extent necessary to maintain the obligation of contracts entered into under authority of that leasing act. It follows that a lease properly issued cannot be canceled merely to permit the issuance of an unrestricted patent to an entryman because of a subsequent change of classification of the land. *Pace v. Carstarphen et al.*, 50 L.D. 369 (1924) is not the contrary [sic]. There an oil and gas permit was issued for land in an outstanding settlement claim at a time when the land was not withdrawn, classified, or valuable for oil and gas." *Acting Solicitor's Opinion*, 61 L.D. 459, 461 (1954). See also 5A *Corbin on Contracts*, §§ 1169, 1170 (1964).

We must presume that when this Department or the Forest Service issues a permit or makes a sale under the Materials Act for a common variety of material it makes a determination that the deposit of material is, in fact, not an uncommon variety locatable under the mining laws. *Cf. Diamond Coal Co. v. United States*, 233 U.S. 236, 239 (1914). Where no mining claim has been located and the administering agency issues a permit or makes a sale because the facts known at the time do not establish that the deposit has a property giving it a special and distinct value, the permit or sale is lawful. If, subsequently, facts become established which tend to prove that a property in the deposit may give it a special and distinct value, that does not establish that the initial determination was unlawful or improper where the deposit did not then have a known special and distinct value.⁶ Of

⁶ See the quotation in n. 5, *supra*, and the following quotation:

"Land not known at the time to be mineral in character may be devoted to purposes recognized by law as proper in aid of the objects sought to be attained by establishment of forest reserves or coming within the purview of the appropriation acts for protection and administration of such reserves, and subsequent discovery of mineral therein will not affect its use for those purposes or render it liable to exploration, location, or entry under the mining laws. This is in accord with the general rule that the known character of land at the date of its sale controls and that the right and title of a purchaser from the United States cannot be defeated or affected by subsequent discovery of mineral in the land (*Defebach v. Hawke*, 115 U.S. 392, 404 [1885]; *Aspen Consolidated Mining Co. v. Williams*, 27 L.D. 1, 15-18 [1898]). This rule is equally applicable to appropriations of public land for public uses and its application is necessary to properly safeguard and protect public interests. The known character of land at the time

course, upon a determination that the deposit is an uncommon variety, no new sales of the materials or permits for free use could thereafter be made as long as the deposit is deemed locatable under the mining laws. *See* 43 CFR 3601.1.

To conclude, I would remand this case for an additional hearing on the matters I have discussed which need further factual information.

of its appropriation for government use, in this case for use in protecting and administering forest reserves and accomplishing the objects sought by establishment of such reserves, is the criterion for determining its liability to such appropriation. Having been once properly devoted to such public use no change in its known character resulting from subsequent discovery of mineral therein can have any effect upon such appropriation or make the land subject to exploration, location or entry under the mining laws. [*Emphasis added.*]"

Opinion of the Assistant Attorney-General, approved by the Secretary of the Interior, 35 L.D. 262, 68 (1906). *See also*, *Diamond Coal Co. v. United States*, *supra*.

I would rule, at the very least, that a mining claim located after permits for free use or for materials sales are subject to those sales and permits so long as they are in effect. Pending a more complete factual determination and opportunity for all interested parties to present briefs, I would postpone ruling on the question of whether the existence of the permits temporarily segregates the land or constitutes such an appropriation of the land that a mining claim located while they are in effect is void *ab initio* as to such land. *Cf. Acting Solicitor's Opinion*, M-36554 (March 24, 1959); *Filtrol Co. v. Brittan & Echart*, 51 L.D. 649 (1926).

JOAN B. THOMPSON,
Administrative Judge.

September 4, 1974

EASTERN ASSOCIATED COAL CORPORATION

3 IBMA 303

Decided September 4, 1974

Appeal by Eastern Associated Coal Corporation from a decision by an Administrative Law Judge, issued October 3, 1973, upholding an imminent danger withdrawal order and dismissing an Application for Review in Docket No. HOPE 73-266.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

The voluntary commencement of the abatement process by an operator prior to issuance of an imminent danger withdrawal order does not invalidate the order.

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; J. Philip Smith, Esq., Assistant Solicitor, Mark M. Pierce, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Eastern Associated Coal Corporation (Eastern) appeals from a decision in Docket No. HOPE 73-266 by an Administrative Law Judge dismissing its Application for Review and upholding the validity of an imminent danger

closure order issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act), 30 U.S.C. § 814(a) (1970). The withdrawal order in question, 1 HM, was issued on August 28, 1972, and the conditions cited therein read as follows:

Loose scales of roof, rock and coal-ribs overhanging coal and rock brows were present along the active roadways, empty sidetrack in Nos. 1, 2, 3 and 4 entries respectively, in 5 Left Pond Fork Mains section, however, management was in the process of correcting these conditions and coal production had not been started.

Eastern challenges the decision below in two respects. First, it argues that the closure order should not have issued because the operator was already engaged in abatement. Second, it claims that the Judge erroneously concluded that the roof condition in this case amounted to imminent danger on the basis of the assumption that substandard roof and rib conditions are *ipso facto* imminently dangerous.

[1] With respect to the first argument, we are of the opinion that it states no valid defense. Initiation of the abatement process on a voluntary basis, while laudable, does not in itself preclude the issuance of a section 104(a) closure order where an inspector observes a condition or conditions constituting imminent danger, as that term is defined in the Act. See generally *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Em-

81 I.D. No. 9

ployment Safety and Health Guide, par. 16,567 (1973). Section 104(a) is phrased in mandatory rather than permissive terms and an inspector *must* issue an order of withdrawal where he determines that imminent danger exists. We believe that Congress clearly intended this result in such a situation in order to assure that, during and prior to abatement, mining personnel not essential to abatement *remain* withdrawn and are prohibited from entry into the affected area until the hazard is removed, 30 U.S.C. §§ 814(a), (d) (1970). The case at hand provides a good illustration of the activities, unrelated to abatement, which Congress sought to ban in order to minimize the number of miners exposed to danger. Here, the area in question had not been "dangered off" (Tr. 208-211), that is to say, there were no warning signs at the entries ordering miners not to proceed. Moreover, the record shows that members of the production crew were engaged in tasks within the dangerous area having no connection with the abatement process (Tr. 79). We, therefore, conclude that the Judge correctly rejected Eastern's defense of voluntary abatement. *Eastern Associated Coal Corporation*, 2 IBMA 128, 136-137, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973), *aff'd sub nom Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals*, No. 73-1859, CCH Employment Safety and Health Guide,

par. 17,275 (4th Cir., February 12, 1974).

We likewise hold that Eastern's second contention provides no basis for reversal. We agree with Eastern's abstract proposition that deviations from the roof, rib, and face control regulations are not necessarily or inevitably imminent dangers, and as we observed in *Freeman Coal Mining Corporation, supra*, " * * * each case must be decided on its own peculiar facts." 2 IBMA at 212. While the Judge indicated that he regarded *most* dangerous roof conditions as imminently dangerous, he did *not* say that he thought that they *all* were. (Dec. 4.) Although we do not subscribe to his general proposition, we do not believe that it constituted error because he did not give it the effect of a presumption. In addition, our independent review of the record supports the Judge's explicit findings and discussion of the testimonial evidence. (Tr. 21-22, 45, 79, 113-114, 120, 191-195, 201-206, 216-217.)

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-entitled docket IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

September 9, 1974

**ADMINISTRATIVE APPEAL OF
MARVIN MURPHY v. AREA
DIRECTOR, ANADARKO AREA
OFFICE, ET AL.**

3 IBIA 47

Decided September 9, 1974

Appeal from a decision of a Special Board of Appeals impanelled by the Commissioner, Bureau of Indian Affairs, affirming the action of the Iowa Tribal Council canceling a tribal land assignment.

DISMISSED.

1. Indian Lands: Assignments—Indian Lands: Tribal Lands—Indian Lands: Generally

Cancellation of Tribal Land Assignments are governed by the terms of the assignment as agreed upon by the parties thereto.

APPEARANCES: Marvin Murphy, pro se.

OPINION BY ADMINISTRATIVE JUDGE WILSON

*INTERIOR BOARD OF
INDIAN APPEALS*

Marvin Murphy, the appellant herein, under date of July 1, 1974, directed a letter to Rogers C. B. Morton, Secretary of the Interior, regarding a decision of a Special Board of Appeals confirming the cancellation of a tribal land assignment by the Iowa Tribal Council through its Executive Committee. The letter will be considered as an appeal by the Board.

The appeal, together with the administrative record regarding the matter, was referred to this Board on August 12, 1974, by the Bureau of Indian Affairs for review and final disposition.

The events leading to the appeal herein, according to the record, are as set forth hereinafter.

The assignment, comprising tribal lands described as Plot 3, Tract 4, more particularly described as that portion of Tract 4 lying "South of the Road," contained in lots 5 and 6 of the SE $\frac{1}{4}$, sec. 12, T. 1 S., R. 18 E., 6th P.M., containing 50 acres, was originally the assignment of one Homer B. Campbell.

The acreage in question was re-assigned to the appellant on March 24, 1956, by the Iowa Tribal Council. The possession and use thereof remained unchallenged through and including January 6, 1973, when the General Council of the Iowa Tribe through Resolution Number 73-R-16, canceled and revoked the appellant's assignment effective as of that date for the following reasons:

- (1) Assigned lands do not constitute your usual place of residence,
- (2) Assignment is not personally operated by you; and
- (3) Use fees have not been paid since 1967.

The appellant thereafter appealed the Tribe's cancellation under the provisions of section 7(b) of the assignment which in pertinent part provides:

If an assignment is revoked without the consent of the assignee, he may thereupon appeal within sixty (60) days

from the date of notice of revocation to the Commissioner of Indian Affairs, who thereupon shall establish a Board of Appeals as described above. Pending a decision by the Board of Appeals, the right of the assignee to the continued use and occupancy of the assignment shall not be abridged.

The method of creating the Board of Appeals by the Commissioner, Bureau of Indian Affairs, is set forth in section 7 of the assignment which provides:

Upon receiving such protest, the Commissioner shall authorize the creation of a Board of Appeals, one member to be named by the person or group making the protest, one to be named by the Iowa Executive Committee, and a third member to be designated by the Commissioner of Indian Affairs, Provided, that the third member shall not be affiliated with the tribe and shall not be an employee of the Indian Service within the administrative region.

The Board of Appeals thereafter was impanelled by the Commissioner, Bureau of Indian Affairs, to conduct a hearing on appellant's appeal.

The record indicates several attempts were made to hold the hearing but without success. Finally, on April 10, 1974, the Special Board convened with only two members since the appellant refused to participate therein. Based on the findings of said hearing, an order was issued by the Special Board on April 10, 1974, wherein it affirmed the Iowa Tribe's cancellation of the appellant's assignment. A copy of the Special Board's Hearing Order is attached hereto and made a part hereof.

The only issue to be resolved by this Board is whether the decision of the Special Board impanelled by the Commissioner, Bureau of Indian Affairs, pursuant to section 7 of the assignment, was final for the Department.

In this connection it is noted that section 7(f) of the assignment specifically provides:

The decision rendered by the Board of Appeals in any of the above disputes *shall be final.* (Italics supplied.)

[1] The appellant in accepting the reassignment of the land in question was bound by the provisions of the assignment. Accordingly, the Board finds that the decision of the Special Board of Appeals of April 10, 1974, affirming the Tribe's cancellation of appellant's assignment is final for the Department and that no further administrative remedy is available to the appellant. The appeal should therefore be dismissed.

Assuming arguendo, that the Special Board of Appeals' decision was not final for the Department, a review of the administrative record indicates quite clearly that the appellant was extended every opportunity to resolve the matter. The record reflects his uncooperative attitude to resolve the matter through the appeals procedure set forth in the assignment. Evidence thereof is indicated by his refusal to accept certified mail, requests for postponements, and his refusal to participate, personally or through counsel, in either of the hearings as scheduled. Moreover, the record

AREA DIRECTOR, ANADARKO AREA OFFICE, ET AL.

September 9, 1974

further indicates appellant's refusal to designate a member to sit on the Special Board as provided in the assignment. In light of the foregoing circumstances, the appellant can hardly say he was deprived of the opportunity to be heard and to refute the charges on which the cancellation of his assignment was effected.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (Section 211.137, Departmental Manual, December 14, 1973), the appeal of Marvin Murphy is hereby DISMISSED.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR: DAVID J. MCKEE,
Chief Administrative Judge.

BEFORE A SPECIAL BOARD
OF APPEAL AUTHORIZED
BY THE ACTING ANA-
DARKO AREA DIRECTOR
UNDER DELEGATION BY
THE ASSISTANT TO THE
SECRETARY OF THE INTE-
RIOR IN THE MATTER OF
THE LAND ASSIGNMENT
OF MARVIN MURPHY

HEARING ORDER

NOW, on this 10th day of April 1974, comes to be heard the appeal of Marvin Murphy from the action

heretofore taken by the Iowa Tribal Council in canceling his assignment to certain lands described as Plot 3, Tract 4, more particularly described as that portion of Tract 4 lying "South of the Road," contained in Lots 5 and 6 of the Southeast Quarter, Section 12, Township 1 South, Range 18 East, containing 50 acres, Brown County, Kansas.

Mr. Murphy made an appearance with one, Leonard Fee, whom Mr. Murphy identified as his designee to the Board; however, he refused to allow Mr. Fee to sit as a Board member because he was without counsel and felt the Hearing should again be rescheduled for another date inasmuch as he had notified the Area Office that his attorney had other commitments this date. The Iowa Tribe's designee, Mrs. Merzl Schroeder and Mr. Louis White, the Commissioner's designee, made an appearance. Members of the Iowa Tribal Executive Committee present were: Forrest Fee, Albert Green and Murray Campbell.

There having been two previous postponements and one aborted Hearing, it was decided to convene the Hearing with two Board members presiding and the third present. For the record, it should be stated that Mr. Murphy implied that he had no intent to participate in the Hearing. The following Findings and Conclusions are based on the documentation available for review

and the limited verbal testimony presented.

Findings

According to the documentation before the Board which was not rebutted by Mr. Murphy we find that:

1. Mr. Murphy resides in Hiawatha, Kansas. His limited occupancy of the assignment does not reflect an intention of permanent residency on the assigned premises.

2. Mr. Murphy does not own farming equipment and is not personally utilizing the land nor is he engaged in a farming operation in a manner contemplated by the landless Indian assignment program. Evidence indicates that Dwight Fee operates the assignment without sanction or approval of the proper tribal officials.

3. He has paid no use fees since 1967.

4. The record reflects that the Tribal Officials made extensive efforts to resolve the land assignment to Mr. Murphy's advantage.

5. Mr. Murphy offered no evidence in his behalf to refute the above.

CONCLUSIONS AND ORDERS

1. Mr. Murphy was in violation of the Assignment Agreement for the above stated reasons.

2. The Tribe acted properly in effecting the cancellation of the Assignment.

3. In view of Mr. Murphy's failure to appear before the Tribal Land Assignment Committee, by not accepting mail from the tribe or the Horton Agency or to make formal presentation before the tribe as provided in Sec. 7(e) of the Assignment, or before the Board, the cancellation is hereby affirmed. The Iowa Tribe shall have the right to immediate possession to all of said described real estate not now under cultivation. As soon as the 1974 crop is harvested, the operator or operators and assignee shall have no further rights thereon.

The above and foregoing order of the

Special Board of Appeal was on this 10th day of April 1974, approved as indicated below by a majority consent of its members.

APPROVED:

LOUIS WHITE

MERZL SCHROEDER

DISAPPROVED:

KENTLAND-ELKHORN COAL CORPORATION

3 IBMA 308

Decided September 11, 1974

Appeal by Kentland-Elkhorn Coal Corporation (Kentland-Elkhorn) from a decision of an Administrative Law Judge (Docket No. PIKE 72-237), dated January 3, 1974, dismissing its Application for Review of an imminent danger Order of Withdrawal filed pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

A finding that three of four braking systems of a self-propelled mantrip car were inoperative will support a finding of imminent danger.

APPEARANCES: Raymond E. Davis, Esq., for appellant, Kentland-Elkhorn Coal Corporation; Michael T. Heenan, Esq., Trial Attorney, for appellee,

and the limited verbal testimony presented.

Findings

According to the documentation before the Board which was not rebutted by Mr. Murphy we find that:

1. Mr. Murphy resides in Hiawatha, Kansas. His limited occupancy of the assignment does not reflect an intention of permanent residency on the assigned premises.

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APPEARANCES: Raymond E. Davis, Esq., for appellant, Kentland-Elkhorn Coal Corporation; Michael T. Heenan, Esq., Trial Attorney, for appellee,

September 11, 1974

Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On May 9, 1972, a Bureau of Mines (now Mining Enforcement and Safety Administration) inspector, during an inspection of Kentland-Elkhorn's No. 2 Mine, issued Order of Withdrawal No. 1 FCR, May 9, 1972, pursuant to section 104 (a) of the Act.¹ The Order cited the following condition:

The Hart self propelled mantrip car was not in a safe operating condition in that only 1 braking system was operative and the sanding system was also inoperative.

The Order was terminated approximately two hours and 45 minutes after its issuance.

Kentland-Elkhorn filed a timely Application for Review of the Order and a hearing was held before an Administrative Law Judge (Judge) on October 16, 1973. The following facts were developed at the hearing and are not in dispute: (1) The mantrip car weighs between 3,000 and 4,000 pounds and normally carries eight to ten men on trips taking approximately 20 minutes at the beginning and end of each shift while traveling at speeds

of six to eight miles per hour. (2) The mantrip car customarily travels over areas of the mine in which the track was wet. (3) The mantrip car is equipped with two separate, independent braking systems—a two-part hydraulic system with each part acting independently on the front and rear of the mantrip, and an emergency manual windup system; in addition, it is equipped with a sanding system which is used to create traction on grades and has utility in stopping the vehicle. (4) Half of the hydraulic braking system was inoperative at the time the Order was issued; the sanding system was also inoperative. (5) On the evening before the Order was issued the mantrip car had gone out of control on a grade on wet track.² (6) The inspector who issued the Order is an expert in the field of coal mine health and safety. (7) After issuing the Order, the inspector instructed employees of the operator to slowly take the mantrip car under its own power, to the shop for repairs.

There is conflict in the evidence as to the condition of the emergency manual windup braking system (windup system) at the time the Order was issued. Two witnesses for Kentland-Elkhorn testified that the windup system was operative but neither had personally checked it.³

² The inspector testified that this was brought to his attention by a member of the UMW Safety Committee (Tr. 33).

³ One of these witnesses testified that he was told by a third person who had examined the windup system in his presence that it was operative.

On the other hand, the inspector testified that he checked the windup system and found it to be frozen in place. According to the inspector, the mantrip car, with half of its hydraulic braking system, its sanding system, and its windup system all inoperative, could not be used without the risk of serious injury. He issued the Order to prevent men from being transported on the mantrip car.

In his decision the Judge accorded greater weight to what he characterized as the "more concise, accurate and revealing" testimony of the inspector. He credited the inspector's version of the condition of the mantrip car, thus finding that the only operative braking system on the mantrip car at the time the Order was issued was one half of the hydraulic system. He concluded that the established inoperability of three of the four independent systems together with the circumstance that the mantrip car had gone out of control the previous evening constituted an imminent danger, and that the inspector reasonably believed that death or serious physical harm could result if normal work activity were carried on before repairs were made. Accordingly, he dismissed the Application for Review.

Issue Presented

Whether the conditions cited in the Order of Withdrawal support the conclusion that an imminent danger existed.

Discussion

In its attempt to establish that imminent danger did not exist, Kentland-Elkhorn: (1) emphasizes the conflicting evidence with respect to the windup system; (2) asserts that imminent danger is negated in that the inspector allowed the mantrip to proceed to the shop in its allegedly dangerous condition; and (3) suggests that the Judge's reliance on the hearsay to the effect that the mantrip car had gone out of control the previous evening, was misplaced.

[1] Having carefully reviewed the record the Board finds no error in the Judge's valuation of the evidence or conclusions of law and accordingly concludes that the Application for Review was properly dismissed. At the time the Order was issued, the mantrip car was in a condition which rendered it unsafe for its normal use of transporting men to and from their places of work in the mine. It was therefore necessary and prudent for the inspector to take the mantrip car out of service so that repairs could be made. The cautious removal of the mantrip to the shop does not negate its defects, render them any less dangerous, or vitiate the inspector's conclusion that an imminent danger existed.⁴ Moreover, the necessity for the presence of persons in imminent danger areas (here the mantrip car) to abate a danger is clearly recognized

⁴ *Zeigler Coal Company*, 3 IBMA 54, 81 I.D. 147, CCH Employment Safety and Health Guide, par. 17,533 (1974).

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by the Act.⁵ Applying the criteria of imminent danger enunciated in prior decisions of this Board⁶ we conclude that an imminent danger was presented by the circumstances of this case.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,

Alternate Administrative Judge.

ESTATE OF CAROLINE J. CHARLES
(BRENDALÉ)

(YAKIMA ALLOTTEE NO. 4240,
DECEASED)

3 IBIA 91

Decided September 12, 1974

This is an Order of Remand to an Administrative Law Judge to correct

⁵ Section 304(d).

⁶ *Eastern Associated Coal Corporation*, 2 IBMA 128, 80 I.D. 400, CCH Employment Safety and Health Guide, par. 16,187 (1973); *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide, par. 16,567 (1973).

error by the conduct of new and further proceedings.

Remanded.

1. Indian Probate: Secretary's Authority: Generally 381.0

Where it becomes necessary, the Secretary in the exercise of his supervisory authority reserved in 43 CFR 4.5, may assume original jurisdiction of a pending Indian probate, and if no regulations relative to procedures are effective at the time, he may remand the case to an administrative law judge with directions governing further or additional proceedings.

APPEARANCES: Arthur W. Kirschmann of the law firm of Kirschmann, Devine and Fortier for Philip Brendalé.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCKEE

INTERIOR BOARD OF INDIAN
APPEALS

This matter comes on for consideration as a proceeding collateral to and conducted in conjunction with consideration of the complaint filed in the United States District Court for the Eastern District of Washington, in the action entitled *Philip Brendalé as Executor of the Estate of Caroline B. Charles, Deceased v. United States of America, et al.*, Civil Action No. C-74-21, filed February 1, 1974.

A stipulation entered into by the parties in this case is as follows:

IT IS HEREBY STIPULATED AND AGREED by and among the respective parties hereto through their respective

counsel that at the request of the Interior Department the claim of the plaintiff be resubmitted to the office of Hearings and Appeals in order that the same may be reconsidered by the Secretary of Interior.

IT IS FURTHER STIPULATED AND AGREED, as aforesaid, that the above-entitled action be held in abeyance pending final administrative action in accordance herewith.

DATED at YAKIMA, WASHINGTON, this 28th day of June, 1974.

The proceedings herein are in furtherance of the purpose of the stipulation.

An examination of the probate records in the *Estate of Cecelia Smith (Borger), Deceased*, Yakima Allottee No. 4161, Probate No. E-182-59, the *Estate of Morris A. Charles, Deceased*, Yakima Allottee No. 4247, Probate No. IP PO 38K 71, and the record in the probate of the estate of this decedent, Caroline B. Charles also known as Caroline J. Charles (Brendale), Probate No. IP PO 48K 74, reveals the following.

Cecelia Smith and Morris Charles were the children of Mary Charles, deceased Yakima Allottee No. 4244, each of whom inherited a one-fourth interest in her allotment described as the SW $\frac{1}{4}$ of sec. 8, T. 7 N., R. 13 E., Willamette Meridian, Yakima County, Washington, containing 160 acres. Cecelia died in 1958 and by her will left her one-fourth interest, one-half each to the daughters of her brother, Morris A. (K.) Charles, i.e., Caroline B. Charles and Mary (Ardle) Andal. Upon the approval of the will on May 15, 1959, it was determined

that under the Act of August 9, 1946 (60 Stat. 968, as amended, 25 U.S.C. § 607) Caroline B. Charles was eligible to receive her interest under the Act as an enrolled member of the Yakima tribe and as one having a one-fourth blood quantum of the Tribe, whereas Mary Andal did not have sufficient blood quantum. The interest devised to Mary was therefore distributed as intestate property to her father, Morris Charles, vesting in him an additional $\frac{1}{8}$ interest in the allotment of Mary Charles making a total of $\frac{3}{8}$.

Morris A. (K.) Charles died November 23, 1964, leaving a will by which he devised all of his property to his daughter, Caroline. However, the probate of his estate could not be closed for the reason that the original showing of the blood quantum of Caroline as a one-fourth had been challenged, and she had been held to be only a one-eighth Yakima. This ruling was appealed successively to the Commissioner of Indian Affairs and then to the Secretary, and was not ultimately decided until April 11, 1969, when her classification as a person of one-eighth blood quantum was affirmed. Attached hereto as "Appendix A" is the certificate of blood and enrollment originally relied upon by the Examiner in the *Estate of Cecelia*; also attached as "Appendix B," is the decision of the Secretary issued April 11, 1969; and "Appendix C" bearing the notation by the Examiner that he was not advised of the Secretary's decision of April 11, 1969, until March 24, 1972.

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The final decision in the probate of the *Estate of Morris Charles* was thus delayed until March 31, 1972, when the will was approved under the Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607), an amendment of the Act of August 9, 1946, *supra*. By this amendment, the normal heirs or devisees who are not members of the Yakima Tribe and not of one-fourth of the blood of the Tribe could take and hold the property passing to them upon death, subject only to the option of the Tribe to purchase the same at its fair market value as determined by the Secretary after appraisal. By its terms the amendment was made effective as to all estates pending before the Examiner at the date of the Act.

Immediately following the approval of the will of Morris Charles, the Yakima tribe indicated its election to take the $\frac{3}{8}$ interest in the Mary Charles allotment shown in the inventory of his estate.

An appraisal of the property was informally furnished by the Bureau of Indian Affairs, and without any other action the Bureau transferred the requisite funds from the Tribe's account to the account of the *Estate of Morris Charles*. On May 12, 1972, the Examiner issued a Supplemental Order of Distribution in which he recited the filing of the election by the Tribe to take, and the transfer of funds *on the valuation shown by the appraisal*. Without making any finding as to the fair market value the Examiner

decreed the $\frac{3}{8}$ interest in the allotment of Mary Charles to the Tribe. Therefore the $\frac{3}{8}$ interest, which would have passed to this decedent under the will of her father, is not shown on the inventory in this probate.

However, there is an additional $\frac{1}{8}$ interest in the same allotment of Mary Charles to be included in the inventory of this estate. On the present record, this $\frac{1}{8}$ interest was acquired through the will of *Cecelia Smith (Borger)*, *supra*. The tribe has indicated its election in this estate to take the $\frac{1}{8}$ interest, but there has been no transfer of funds and there is no order in the record transferring the title to the tribe.

[1] The title to this $\frac{1}{8}$ interest in the allotment of Mary Charles is subject to the corrective action which is initiated simultaneously with the issuance of this order, in the *Estate of Cecelia Smith (Borger)*. The corrective action to be taken *nunc pro tunc* will have the effect, if the new proceeding confirms the record before the Board, of passing the $\frac{1}{8}$ interest through the will of Morris A. Charles to this decedent, and through her will to her sole devisee. By the present record the $\frac{1}{8}$ interest incorrectly passed to this decedent directly from the said Cecelia. The title of such $\frac{1}{8}$ interest would be held, under the order approving the will of this decedent issued February 12, 1974, by Philip Brendale enrolled as a Cowlitz Indian as the successor in interest. As a result of

his non-enrollment in the Yakima Tribe, he holds his title subject to the right of the Yakima Tribe to take it from him upon payment of the fair market value as determined by the Judge.

In the conditional order entered this date by the Board in the *Estate of Morris A. (K.) Charles, Deceased, supra*, it is provided that the $\frac{1}{8}$ interest in the allotment of Mary Charles added to the inventory shall be made available in that probate proceeding for purchase by the Tribe. The finding is made that if the Tribe fails to elect to take and pay for the additional $\frac{1}{8}$ interest in proceedings in the *Estate of Morris A. (K.) Charles*, then the title shall be distributed by the Judge to the United States in trust for Philip Brendale under the will of this decedent.

A further finding is made that the Judge should modify the order approving the will in this estate entered February 12, 1974, to eliminate therefrom the provision that the Yakima Tribe will have two years from the date of such order in which to exercise its statutory option as to the $\frac{1}{8}$ interest.

A further finding is made that a similar modification of the said order should be entered by the Judge to eliminate the two years' provision for the Tribes of Warm Springs Reservation to take this decedent's interest in land on that reservation.

The modification of the order insofar as it applies to the Warm Springs interests stems from the

provisions of the Act of August 10, 1972 (86 Stat. 530), which is almost identical to the provisions of the Act of December 31, 1970, applying to the Yakima Tribes. The Act of August 10, 1972, provides that interests in lands on the Warm Springs Reservation pass upon death by inheritance or devise to a non-member of the Tribe (no requirement is made concerning blood quantum of the Warm Springs Tribes), but that they are subject to an option of the Tribe to purchase such interests so inherited at the fair market value as determined by the Secretary after appraisal.

As above indicated, the sole devisee in the decedent's will, Philip Brendale, is shown to be an enrolled member of the Cowlitz Tribe of Indians, presumably not enrolled in the Warm Springs Tribes of Oregon. Under the statute, he is ineligible to hold his title to the Warm Springs interest if the Tribe shall elect to take and pay for said interest. A finding is made that Judge Montgomery shall issue a notice to the Warm Springs Tribes specifying the interests which appear of record to be subject to the Tribal option. He shall allow 45 days, or any extension thereof granted upon a petition timely filed, for the Tribe to file its election to take. He shall simultaneously issue an order to the Superintendent of the Warm Springs Agency to procure at an early date an appraisal of the interests which are available to the Tribe with a report to be filed at the Agency. A summary of the report

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shall be furnished for distribution to all parties of interest.

A copy of the order shall be mailed to the attorney for Philip Brendale who may procure an independent appraisal report if he so desires, and a summary of any such report obtained by him shall be filed with the Judge and distributed to all parties in interest.

On August 30, 1974, new regulations were published in 39 F.R. 31635 in final form, effective September 30, 1974, as to all pending matters arising under the Act of August 10, 1972 (86 Stat. 530). These appear as a new addition to the 43 CFR Subpart D beginning with § 4.300. After the effective date of these regulations if the Tribe shall elect to take the interest on the Warm Springs Reservation available to it, then further proceedings in relation to the determination of the fair market value and the payment thereof shall be governed by the said regulations.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ORDERED:

1. That further proceedings shall be conducted by Judge R. J. Montgomery in the probate of this estate in accordance with the findings herein set forth; and

2. That such further proceedings shall be conducted by the Judge as are necessary to the ultimate distribution of the assets of the

estate and the final closing of the probate thereof.

This decision is final for the Department.

DAVID J. MCKEE,
Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

APPENDIX A

February 6, 1959

Superintendent
Yakima Indian Agency
Toppenish, Washington

RE: Cecelia Smith Vergote
Yakima No. 4161

Dear Sir:

Please examine the roll of tribal membership prepared under the Act of August 9, 1946 (60 Stat. 969), and advise whether the following named individuals, who appear to be probable heirs in this estate, are enrolled members of the Yakima tribes, of $\frac{1}{4}$ or more degree of Indian blood of such tribes, as required by section 7 of that Act:

Mary Andle, Niece
Caroline Charles, Niece
Morris Charles, Brother
Frank (Phillip) Charles (born 1893),
Nephew

Rosa Mamie Cashier Simmons (Rose C. Mitchell), Niece (adopted)

Sincerely,
R. J. MONTGOMERY,
Examiner of Inheritance.

RJM:nb

I certify that the above named persons are not eligible as required by the said Act to inherit in the above estate. EXCEPT Morris Charles ($\frac{1}{4}$ Yakima) and Caroline Charles ($\frac{1}{4}$ Yakima), whom

are eligible as required by the said act to inherit in the above estate.

APPENDIX B

Mr. Arthur W. Kirschenmann
Attorney at Law
Yakima Legal Center
303 East "D" Street
Yakima, Washington 98901

April 11, 1969

Dear Mr. Kirschenmann:

You have appealed from the Acting Assistant Commissioner of Indian Affairs' decision of August 6, 1968, which upheld the Acting Deputy Assistant Commissioner's affirmance of the action taken by the Yakima Tribal Council to lower the Yakima blood degree of Caroline B. Charles from $\frac{1}{4}$ to $\frac{1}{2}$ degree. You base your appeal upon your belief that the tribal council's action in correcting the degree of Yakima blood ascribed to your client was of a judicial nature rather than the mere rectification of a clerical error in the membership records.

As part of its internal sovereignty and in the absence of express statutory provisions or Federal regulations to the contrary, the Yakima Tribal Council has full power to correct clerical errors affecting the descent and distribution of the property of its members. More than that, the Yakima Tribal Council would be remiss in its responsibility to all of the tribal members were errors affecting the descent and distribution of property of the members not corrected. Nothing in the Act of August 9, 1946 (60 Stat. 969), which authorizes and directs the preparation of the Yakima membership roll, prohibits the tribal council from making corrections of clerical errors and the policy of the Bureau of Indian Affairs, as indicated in the Acting Assistant Commissioner's letter of August 6, would not operate to prohibit such corrections of clerical errors.

We concur in the Acting Assistant Commissioner's finding that the tribal council's procedure in changing Miss

Charles' degree of Yakima blood was inadequate inasmuch as no follow-up attempt was made to locate her to advise her of the change. However, the responsibility for keeping tribal governing bodies advised of current addresses necessarily lies with the tribal members themselves and the Yakima Tribal Council cannot be held solely responsible for not knowing the whereabouts of your client. Your client apparently neglected to inform the postal authorities of her change of address and as a result, the letter addressed to her by the tribal council could not be forwarded to her. In any event, this lack of proper notification was remedied when Miss Charles was offered an opportunity to present evidence bearing on her blood degree to the Commissioner.

Your client was enrolled under the provisions of Section 1(a) of the Act of August 9, 1946, which pertains to the enrollment of Yakima allottees. That action does not require the minimum possession of any degree of Yakima blood as a prerequisite for enrollment.

Your contention that the Commissioner of Indian Affairs had confirmed Miss Charles' degree of Yakima blood by approving the supplemental roll which contained her name cannot be upheld. The Commissioner approved her enrollment because she was an original allottee and, therefore, met the provisions of Section 1(a).

The record indicates that in her application for enrollment with the Yakima Tribes dated July 27, 1955, your client claimed only $\frac{1}{8}$ degree Yakima blood. The Yakima-Tribal Enrollment Committee erred when it enrolled her as $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually. When your client was notified by the Chairman of that committee on February 28, 1956, that her application had been accepted and that she was found to possess $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually blood, she should have advised the enrollment committee of its error. The letter dated February 28, 1956, specifically allowed 30 days for corrections to be made on the findings of the enrollment com-

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mittee. Miss Charles did not advise the enrollment committee of its error and allowed that error to go uncorrected for years, accepting those benefits that should rightly have accrued only to those members of the Yakima Tribes who possessed at least $\frac{1}{4}$ degree Yakima blood.

Based on the foregoing, we conclude that the determination of the Acting Assistant Commissioner should be sustained. Your appeal is dismissed.

Sincerely yours,

HARRISON LOESCH,
Assistant Secretary of the Interior.

APPENDIX C

November 14, 1966

Mr. Arthur W. Kirschenmann
Attorney at Law

303 E. "D" Street

Yakima, Washington 98901

Dear Mr. Kirschenmann:

This replies to your letter of October 31, 1966, transmitting therewith an appeal by Caroline Charles, Yakima allottee No. 4240.

We have today referred this matter for appropriate disposition to the Commissioner of Indian Affairs, who has jurisdiction over proposed modifications in the blood quantum shown for individuals on the Yakima roll prepared pursuant to the Act of August 9, 1946, 60 Stat. 963.

We are also sending a copy of this letter to Hearing Examiner Montgomery so that he will be advised that Miss Charles is appealing from the redetermination of her Yakima blood quantum and will therefore be able to coordinate his handling of the estate of Morris Charles with Miss Charles' appeal.

Sincerely yours,

DUARD R. BARNES,
*Assistant Solicitor,
Appeals & Litigation.*

3/31/72: This is the last information we have in the record regarding the appeal. However, Tribal Operations in the Central Office in Washington, D.C. advised this office on 3/24/72, that the appeal had been denied by the BIA.

R. J. MONTGOMERY,
Hearing Examiner.

ESTATE OF CECELIA SMITH
(BORGER)
(YAKIMA ALLOTTEE NO. 4161,
DECEASED)

3 IBIA 56

Decided September 12, 1974

This is an order of reopening and remand to an Administrative Law Judge to correct error by the conduct of new and further proceedings.

Remanded.

1. Indian Probate: Reopening: Waiver of Time Limitation 375.1

Where it becomes necessary, the Secretary in the exercise of the discretion reserved in 43 CFR 4.242(h) may authorize the reopening of an Indian probate closed for more than three years and direct the conduct of further proceedings necessary to the correction of an apparent error in the original probate.

APPEARANCES: Arthur W. Kirschenmann of the law firm of Kirschenmann, Devine and Fortier for Philip Brendale.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCKEE

INTERIOR BOARD OF
INDIAN APPEALS

This matter comes on for consideration as a proceeding collateral

to and conducted in conjunction with consideration of the complaint filed in the United States District Court for the Eastern District of Washington, in the action entitled *Philip Brendale as Executor of the Estate of Caroline B. Charles, Deceased v. United States of America, et al.*, Civil Action No. C-74-21, filed February 1, 1974.

A stipulation entered into by the parties in this case is as follows:

IT IS HEREBY STIPULATED AND AGREED by and among the respective parties hereto through their respective counsel that at the request of the Interior Department the claim of the plaintiff be resubmitted to the office of Hearings and Appeals in order that the same may be reconsidered by the Secretary of Interior.

IT IS FURTHER STIPULATED AND AGREED, as aforesaid, that the above-entitled action be held in abeyance pending final administrative action in accordance herewith.

DATED at YAKIMA, WASHINGTON this 28th day of June, 1974.

The proceedings herein are in furtherance of the purpose of the stipulation.

An examination of the probate record discloses the following facts. During her lifetime Caroline B. Charles was the distributee of a $\frac{1}{8}$ interest in the allotment of Mary Charles, deceased, Yakima Allottee No. 4244, described as the SW $\frac{1}{4}$ sec. 8, T. 7 N. R. 13 E., Willamette Meridian, Yakima County, Washington, containing 160 acres which had been devised to her by the will of Cecelia Smith (Borger) Yakima

Allottee No. 4161, the decedent herein. The decedent died July 28, 1958, at the age of 84 years and her will, dated September 14, 1957, was approved on May 15, 1959.

The will was approved as to Yakima land devised to the said Caroline B. Charles under authority vested in the Secretary of the Interior by the Act of June 25, 1910 (36 Stat. 855, 25 U.S.C. § 372), as amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. § 373), and pursuant to the Act of August 9, 1946 (60 Stat. 968, 25 U.S.C. § 607). The will was correctly held to be inoperative under the Act of August 9, 1946, *supra*, insofar as it made a devise of land on the Yakima Reservation to Mary (Andle) Andal.

A one-half interest in the decedent's estate including her $\frac{1}{4}$ interest in the Mary Charles allotment was ordered distributed under the will to Caroline upon the following findings:

By the terms of decedent's proported will, dated September 14, 1957, she attempts to give her entire trust estate to her nieces, Caroline Charles, and Mary (Andle) Andal, daughters of Morris Charles.

Mary (Andle) Andal has been certified as not eligible to take the decedent's Yakima trust property by the will.

The Act of August 9, 1946, *supra*, required that anyone taking as an heir or a devisee of a person who died owning an interest in lands on the Yakima Reservation must qualify to take such interest by showing that he was enrolled in the Yakima Tribe and that he was of a quarter

blood of the Yakima tribes. The Examiner of Inheritance (now Administrative Law Judge) then found that the part of the will devising an interest in Yakima land to Mary (Andle) Andal, niece, was inoperative and ordered that the interest should pass as intestate property to Morris Charles, brother of the testatrix, her only eligible heir at law.

The record discloses that the Examiner had before him a certificate from the Superintendent of the Yakima Indian Agency dated February 6, 1959, to the effect that Caroline Charles was enrolled and was of $\frac{1}{4}$ Yakima blood. In ordering the distribution under the will of this decedent to Caroline Charles he relied upon this certificate.

It now appears as part of the record in the probate of the *Estate of Morris Charles*, deceased, that the designation of Caroline Charles as being of a $\frac{1}{4}$ blood quantum of the tribe was a matter which had been challenged and was, at the time of the entry of the above distribution order, on appeal. The Secretary issued a final decision on April 11, 1969, in which the finding was made that Caroline Charles was only of $\frac{1}{8}$ Yakima blood. Under this decision it now appears that the full $\frac{1}{4}$ interest owned by this decedent in the allotment of Mary Charles, deceased, should have passed to Morris Charles, as intestate property, he being the only eligible heir at law of this decedent capable of receiving title to Yakima land in-

terests pursuant to the Act of August 9, 1946; *supra*.

The foregoing certificate from the Superintendent of the Yakima Agency is attached hereto as "Appendix A," and a copy of the Secretary's decision of April 11, 1969, *supra*, is attached hereto marked "Appendix B." It is here noted that "Appendix A" and other records show that Morris A. (K.) Charles was Yakima Enrollee No. 4247 and that he was of a $\frac{1}{4}$ Yakima Indian blood.

The record in this probate further shows that he died testate on November 23, 1964, and that the hearing in the probate of his estate was held October 17, 1966. However, no decision in the matter of the approval of his will was issued until March 31, 1972, since the Examiner held the estate open pending the determination of the then pending appeal regarding the blood quantum of Caroline Charles named as sole beneficiary in his will.

The entry of the Secretarial order of April 11, 1969, *supra*, was not made known to the Examiner until March 24, 1972 (*see* "Appendix C") a date subsequent to the passage of the Act of December 31, 1970 (84 Stat. 1874; 25 U.S.C. § 607), amending the Act of August 9, 1946, *supra*. The amendment of 1970 permitted the taking of Yakima land by heirs and devisees who were ineligible under the 1946 Act, but it provided that they take such land on the Yakima subject to a right in the Tribe to buy the land upon pay-

ment of the fair market value as determined by the Secretary after appraisal.

The present proceedings in this estate are related to like proceedings simultaneously initiated under a separate order of this Board in the *Estate of Morris Charles, Deceased*, Probate No. IP PO 38K 71, which will relate to the interest which he held at his death in the allotment of Mary Charles, No. 4244. He is shown in the probate of his estates to have held a $\frac{3}{8}$ interest in that allotment and this will be increased by a $\frac{1}{8}$, if the proceedings herein provided for confirm the records as they now appear before the Board.

Morris Charles named his daughter, Caroline Charles, as his sole devisee. Caroline Charles died testate June 25, 1972, and in her will approved by order of Judge R. J. Montgomery entered February 12, 1974, Philip Brendale, her son, was named executor and sole devisee. He is the apparent successor in interest or right in both the $\frac{3}{8}$ and the $\frac{1}{8}$ interests in the allotment of Mary Charles.

A finding is made that this matter comes within the provisions of 43 CFR 4.242(h) and that the probate of this estate should be reopened by the Administrative Law Judge (formerly Examiner of Inheritance) having probate authority on the Yakima Reservation. The Judge shall afford the successor in interest an opportunity to show good cause why this probate should not be reopened and why the order

of distribution should not be corrected to conform to the Act of August 9, 1946 (60 Stat. 968, *as amended*, 25 U.S.C. § 607) in force at the date of closing the probate. The notice to show cause should include a notice of a hearing at which any necessary testimony may be taken and at which necessary documents not now of record may be presented for admission into evidence to complete the record in this probate.

NOW, THEREFORE, by authority of 43 CFR 4.1, it is ORDERED that Richard J. Montgomery, Administrative Law Judge of Portland, Oregon, shall issue a notice to show good cause within not less than 20 days, or any extension thereof why the *Estate of Cecelia Smith (Borger), Deceased*, Probate No. E 182-59, should not be reopened for the purpose of holding a hearing to modify the distribution contained in the order approving the will and determining heirs issued by him on May 15, 1959. He is limited in this matter to a consideration of the correction of the distribution of a $\frac{1}{8}$ interest in allotment No. 4244, Mary Charles, deceased, of the Yakima Indian Reservation previously distributed to Caroline Charles under the will of this decedent. After hearing he shall consider distribution *nunc pro tunc* of said $\frac{1}{8}$ interest, to Morris A. Charles, now deceased, as intestate property.

IT IS FURTHER ORDERED that he shall issue a decision final for the Department subject to the

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right of appeal as provided in 43 CFR 4 subpart D, but the requirement for the filing of a petition of rehearing prior to appeal is waived.

This decision is final for the Department of the Interior.

DAVID J. MCKEE,

Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

APPENDIX A

February 6, 1959

Superintendent
Yakima Indian Agency
Toppenish, Washington

RE: Cecelia Smith Vergote
Yakima No. 4161

Dear Sir:

Please examine the roll of tribal membership prepared under the Act of August 9, 1946 (60 Stat. 969), and advise whether the following named individuals, who appear to be probable heirs in this estate, are enrolled members of the Yakima tribes, of $\frac{1}{4}$ or more degree of Indian blood of such tribes, as required by section 7 of that Act:

Mary Andle, Niece
Caroline Charles, Niece
Morris Charles, Brother
Frank (Phillip) Charles (born 1893),
Nephew

Rosa Mamie Cashner Simmons (Rose C. Mitchell), Niece (adopted)

Sincerely,

R. J. MONTGOMERY,

Examiner of Inheritance.

RJM: nb

I certify that the above named persons are not eligible as required by the said

Act to inherit in the above estate. EXCEPT Morris Charles ($\frac{1}{4}$ Yakima) and Caroline Charles ($\frac{1}{4}$ Yakima), whom are eligible as required by the said act to inherit in the above estate.

APPENDIX B

April 11, 1969

Mr. Arthur W. Kirschenmann
Attorney at Law
Yakima Legal Center
303 East "D" Street
Yakima, Washington 98901

Dear Mr. Kirschenmann:

You have appealed from the Acting Assistant Commissioner of Indian Affairs' decision of August 6, 1968, which upheld the Acting Deputy Assistant Commissioner's affirmation of the action taken by the Yakima Tribal Council to lower the Yakima blood degree of Caroline B. Charles from $\frac{1}{4}$ to $\frac{1}{2}$ degree. You base your appeal upon your belief that the tribal council's action in correcting the degree of Yakima blood ascribed to your client was of a judicial nature rather than the mere rectification of a clerical error in the membership records.

As part of its internal sovereignty and in the absence of express statutory provisions or Federal regulations to the contrary, the Yakima Tribal Council has full power to correct clerical errors affecting the descent and distribution of the property of its members. More than that, the Yakima Tribal Council would be remiss in its responsibility to all of the tribal members were errors affecting the descent and distribution of property of the members not corrected. Nothing in the Act of August 9, 1946 (60 Stat. 969), which authorizes and directs the preparation of the Yakima membership roll, prohibits the tribal council from making corrections of clerical errors and the policy of the Bureau of Indian Affairs, as indicated in the Acting Assistant Commis-

sioner's letter of August 6, would not operate to prohibit such corrections of clerical errors.

We concur in the Acting Assistant Commissioner's finding that the tribal council's procedure in changing Miss Charles' degree of Yakima blood was inadequate inasmuch as no follow-up attempt was made to locate her to advise her of the change. However, the responsibility for keeping tribal governing bodies advised of current addresses necessarily lies with the tribal members themselves and the Yakima Tribal Council cannot be held solely responsible for not knowing the whereabouts of your client. Your client apparently neglected to inform the postal authorities of her change of address and as a result, the letter addressed to her by the tribal council could not be forwarded to her. In any event, this lack of proper notification was remedied when Miss Charles was offered an opportunity to present evidence bearing on her blood degree to the Commissioner.

Your client was enrolled under the provisions of Section 1(a) of the Act of August 9, 1946, which pertains to the enrollment of Yakima allottees. That action does not require the minimum possession of any degree of Yakima blood as a prerequisite for enrollment.

Your contention that the Commissioner of Indian Affairs had confirmed Miss Charles' degree of Yakima blood by approving the supplemental roll which contained her name cannot be upheld. The Commissioner approved her enrollment because she was an original allottee and, therefore, met the provisions of Section 1(a).

The record indicates that in her application for enrollment with the Yakima Tribes dated July 27, 1955, your client claimed only $\frac{1}{8}$ degree Yakima blood. The Yakima-Tribal Enrollment Committee erred when it enrolled her as $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually. When your client was notified by the Chairman of that committee on February 28, 1956, that her application had been accepted

and that she was found to possess $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually blood, she should have advised the enrollment committee of its error. The letter, dated February 28, 1956, specifically allowed 30 days for corrections to be made on the findings of the enrollment committee. Miss Charles did not advise the enrollment committee of its error and allowed that error to go uncorrected for years, accepting those benefits that should rightly have accrued only to those members of the Yakima Tribes who possessed at least $\frac{1}{4}$ degree Yakima blood.

Based on the foregoing, we conclude that the determination of the Acting Assistant Commissioner should be sustained. Your appeal is dismissed.

Sincerely yours,

HARRISON LOESCH,

Assistant Secretary of the Interior.

APPENDIX C

November 14, 1966

Mr. Arthur W. Kirschenmann

Attorney at Law

303 E. "D" Street

Yakima, Washington

Dear Mr. Kirschenmann:

This replies to your letter of October 31, 1966, transmitting therewith an appeal by Caroline Charles, Yakima allottee No. 4240.

We have today referred this matter for appropriate disposition to the Commissioner of Indian Affairs, who has jurisdiction over proposed modifications in the blood quantum shown for individuals on the Yakima roll prepared pursuant to the Act of August 9, 1946, 60 Stat. 963.

We are also sending a copy of this letter to Hearing Examiner Montgomery so that he will be advised that Miss Charles is appealing from the redetermination of her Yakima blood quantum and will therefore be able to coordinate his han-

September 12, 1974

ding of the estate of Morris Charles with Miss Charles' appeal.

Sincerely yours,
DUARD R. BARNES,
Assistant Solicitor,
Appeals & Litigation.

3/31/72: This is the last information we have in the record regarding the appeal. However, Tribal Operations in the Central Office in Washington, D.C. advised this office on 3/24/72, that the appeal had been denied by the BIA.

R. J. MONTGOMERY,
Hearing Examiner.

ESTATE OF MORRIS A. (K)
CHARLES

(YAKIMA ALLOTTEE NO. 4247,
DECEASED)

3 IBIA 68

Decided September 12, 1974

This is an order of reopening and remand to an Administrative Law Judge to correct error by the conduct of new and further proceedings.

Remanded.

1. Indian Probate: Reopening: Waiver of Time Limitation 375.1—Indian Probate: Secretary's Authority: Generally 381.0

Where it becomes necessary, the Secretary in the exercise of the discretion reserved in 43 CFR 4.5 and 43 CFR 4.242 (h), may authorize or direct reopening of an Indian probate closed for less than three years for further proceedings necessary to the possible correction of an error or omission in the original probate.

2. Indian Probate: Yakima Tribes: Generally 435.0

Under the Act of December 31, 1970 (84 Stat. 1874); 25 U.S.C. § 607, it is necessary that an administrative law judge shall make a finding as to the right of the Yakima Tribe to take the interest of an heir or devisee and also a finding, after appraisal, of the fair market value of the interest which the Tribe elects to take.

APPEARANCES: Arthur W. Kirschmann of the law firm of Kirschmann, Devine and Fortier, for Philip Brendale.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCKEE

INTERIOR BOARD OF
INDIAN APPEALS

This matter comes on for consideration as a proceeding collateral to and conducted in conjunction with consideration of the complaint filed in the United States District Court for the Eastern District of Washington, in the action entitled *Philip Brendale as Executor of the Estate of Caroline B. Charles, Deceased v. the United States of America, et al.*, Civil Action No. C-74-21 filed February 1, 1974.

A stipulation entered into by the parties in this case is as follows:

IT IS HEREBY STIPULATED AND AGREED by and among the respective parties hereto through their respective counsel that at the request of the Interior Department the claim of the plaintiff be resubmitted to the office of Hearings and Appeals in order that the same may be reconsidered by the Secretary of Interior.

IT IS FURTHER STIPULATED AND AGREED, as aforesaid, that the above-

entitled action be held in abeyance pending final administrative action in accordance herewith.

DATED at YAKIMA, WASHINGTON this 28th day of June, 1974.

The proceedings herein are in furtherance of the purpose of the stipulation.

During her lifetime, Caroline B. Charles was the distributee of a $\frac{1}{8}$ interest in the allotment of Mary Charles, deceased, Yakima Allottee No. 4244, described as the SW $\frac{1}{4}$ of sec. 8, T. 7 N., R. 3 E., Willamette Meridian, Yakima County, Washington, containing 160 acres which had been devised to her by the will of Cecelia Smith (Borger), Yakima Allottee No. 4161, a sister of the decedent herein. Cecelia Smith (Borger) died July 28, 1958, at the age of 84 years, and her will dated September 14, 1957, was approved on May 15, 1959.

The will was approved as to the land devised to the said Caroline B. Charles under the authority vested in the Secretary of the Interior by the Act of June 25, 1910 (36 Stat. 855, 25 U.S.C. § 372), as amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. § 373), and pursuant to the Act of August 9, 1946 (60 Stat. 968 as amended, 25 U.S.C. § 607). The will was held to be inoperative under the Act of August 9, 1946, *supra*, insofar as it devised land on the Yakima Reservation to Mary (Andle) Andal.

The $\frac{1}{2}$ interest in Cecelia's estate, including her $\frac{1}{4}$ interest in the Mary Charles allotment was ordered distributed under the will to

Caroline upon the following findings:

By the terms of decedent's purported will, dated September 14, 1957, she attempts to give her entire trust estate to her nieces, Caroline Charles, and Mary (Andle) Andal, daughters of Morris Charles.

Mary (Andle) Andal has been certified as not eligible to take the decedent's Yakima trust property by will.

The Act of August 9, 1946, *supra*, required that anyone taking as heir or devisee of a person who died owning an interest in lands of the Yakima Reservation must qualify to take such interest by showing that he was enrolled in the Yakima Tribe and that he was of $\frac{1}{4}$ blood of the Yakima Tribe. The Examiner of Inheritance then found that the part of the will devising an interest in Yakima land to Mary (Andle) Andal was inoperative and ordered that the interest should pass as intestate property to Morris Charles, a brother, the decedent herein, Cecelia's only eligible heir at law.

The record in that probate discloses that the Examiner had before him a certificate from the Superintendent of the Yakima Indian Agency, dated February 6, 1959, to the effect that Caroline Charles was enrolled and was of $\frac{1}{4}$ Yakima blood. In ordering distribution under the will of Cecelia to her niece Caroline Charles he relied upon the certificate.

It now appears as part of the record in the probate in the estate of this decedent that the designation of Caroline Charles as being of $\frac{1}{4}$ blood quantum of the Tribe was a

matter which had been challenged and was, at the time of the entry of the above distribution order, on appeal. The Secretary issued a final decision dated April 11, 1969, in which the finding was made that Caroline Charles was only $\frac{1}{8}$ Yakima blood. Under this decision it now appears that the full $\frac{1}{4}$ interest owned by Cecelia Smith (Borger) in the allotment of Mary Charles, deceased, should have passed to Morris Charles the decedent herein, as intestate property, he being the only eligible heir at law of this decedent capable of receiving title to the Yakima property pursuant to the Act of August 9, 1946, *supra*.

The foregoing certificate from the Superintendent of the Yakima Agency attached hereto as "Appendix A" and a copy of the Secretary's decision of April 11, 1969, *supra*, is attached hereto marked "Appendix B." It is here noted that "Appendix A" and the other records in this probate show that this decedent, Morris A. (K.) Charles was a Yakima enrollee No. 4247, and that he was of $\frac{1}{4}$ Yakima blood.

The record in this probate further shows that Morris A. (K.) Charles died testate on November 23, 1964, and that a hearing in the probate of his estate was held October 17, 1966. However, no decision in the matter of the approval of his will was issued until March 31, 1972, since the Examiner held the estate open pending the determination of the appeal regarding the blood quantum of

Caroline Charles named as sole beneficiary in his will.

The entry of the Secretarial Order of April 11, 1969, *supra*, was not made known to the Examiner until March 24, 1972, *see* "Appendix C" a date subsequent to the passage of the Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607) amending the Act of August 9, 1946, *supra*. The amendment of 1970 permitted inheritance of land by the heirs and devisees who were ineligible under the 1946 Act. But it provided that they take such land on the Yakima Reservation subject to the right of the Tribe to buy the lands upon payment of the fair market value as determined by the Secretary after appraisal.

The proceedings in this estate are related to like proceedings simultaneously initiated under separate orders of this Board in the *Estate of Cecelia Smith (Borger), Deceased*, which will control the interest this decedent held at his death in the allotment of Mary Charles. He is shown in this probate proceeding to have held only a $\frac{3}{8}$ interest in the allotment which will be increased by a $\frac{1}{8}$ if the proceedings in the *Estate of Cecelia* therein separately provided for confirm the record as it now appears before the Board.

Morris Charles named his daughter, Caroline Charles, as his sole devisee. Caroline Charles died testate June 25, 1972, and in her will approved by order of Judge R. J. Montgomery entered February 12, 1974, Philip Brendale, her son, was

named executor and sole devisee. He is presently the apparent ultimate successor in interest or right in both the $\frac{3}{8}$ and the $\frac{1}{8}$ interests in the allotment of Mary Charles, deceased.

[1] A finding is made that this matter comes within the provisions of 43 CFR 4.5 and 43 CFR 4.242(h) and that the probate of this estate should be reopened by the Administrative Law Judge (formerly Examiner of Inheritance) having probate authority on the Yakima Reservation. The Judge shall afford the successor in interest of the $\frac{1}{8}$ interest received from Caroline Charles an opportunity to show good cause why the probate should not be reopened and the order of distribution in this estate should not be modified to include a $\frac{1}{8}$ interest passing to Caroline B. Charles under the will of this decedent subject to the Act of December 31, 1970, *supra*.

[2] Attention is now directed to the decision of R. J. Montgomery, Hearing Examiner, at Portland, issued there in March 31, 1972, approving the will of this decedent. The order includes the finding:

Decedent's trust estate consisted of an undivided $\frac{3}{8}$ interest in the allotment of Mary Charles, Yakima No. 124-4244 described as the SW $\frac{1}{4}$ 8, -7 N.-13 EWM, in Washington, containing 160 acres.

The following portion of this decision will relate largely to the $\frac{3}{8}$ interest mentioned in the order approving the will since the $\frac{1}{8}$ interest heretofore mentioned was not included in the probate proceedings conducted prior to 1972. The $\frac{1}{8}$ in-

terest may be brought into this proceeding as a result of the anticipated modification of the order of distribution in the *Estate of Cecelia Smith (Borger), Deceased*, Probate No. E 182-59.

In the decision of March 31, 1972, Examiner Montgomery approved the will and directed that the distribution of the entire estate [referring to the $\frac{3}{8}$ interest in the inventory] be made in accordance with the will and his order:

To Caroline B. Charles, Yakima Allottee No. 124-4240 (born 2/5/06), daughter:

Decedent's entire Indian trust estate.

The decedent's interest in Yakima Indian trust property is subject to the option of the Yakima Indian Tribe, within 2 years from the date of this Order, to purchase the Yakima property from the devisee. * * *

Value of land: \$5,888.00.

The trust estate of said decedent subject to the jurisdiction of this Department having been appraised at \$5,888.00, a fee of \$65 will be collected by the Superintendent * * *.

In making the order approving the will and directing distribution the Examiner used the following language:

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior * * * the above-mentioned written instrument dated September 20, 1956, is hereby approved as the Last Will and Testament of the decedent above named, in accordance with section 7 of the Act of August 9, 1946 (60 Stat. 969, 25 U.S.C. § 607), as amended by the Act of December 31, 1970 (84 Stat. 1874).

The Act of December 31, 1970, *supra*, provides in part as follows:

September 12, 1974

Sec. 7(a) A person who is not an enrolled member of the Yakima Tribes with one-fourth degree or more blood of such tribes shall not be entitled to receive by devise or inheritance any interest in trust or restricted land within the Yakima Reservation * * *, *if while the decedent's estate is pending* before the Examiner of Inheritance, the Yakima Tribes pay to the Secretary of the Interior, on behalf of such person, the fair market value of such interest as determined by the Secretary of the Interior after appraisal. * * *

* * *

Sec. 2. The provisions of section 7 of the Act of August 9, 1946, as amended by this Act, shall apply to all estates pending before the Examiner of Inheritance on the date of this Act, * * *. (Italic supplied.)

It is noted that the Order Approving the Will here does not conform to the statutes in that at no point is a *finding* made that Caroline Charles, the sole devisee in the will, lacks enrollment or that she lacks a $\frac{1}{4}$ blood quantum in the Yakima Tribe. The order is further deficient in that there is no *finding* as to the fair market value after appraisal. The only mention of an appraisal which is made in the order is that which refers to the value of the entire estate, and that which is set forth for the limited purpose of fixing a probate fee pursuant to 43 CFR 4.280.

Simultaneously upon issuance of the decision, a notice of the entry thereof was mailed to all the interested parties, and in the notice the following language is included:

This decision becomes final 60 days from the date of mailing of this notice

unless within such period a written petition for rehearing shall have been filed with the Superintendent by an aggrieved party in accordance with the provisions of 43 CFR 4.241.

No petition for rehearing was filed.

The inventory of the estate over the signature of the Yakima agency realty officer appears of record and it describes a $\frac{3}{8}$ interest in the allotment of Mary Charles, deceased, which is valued therein at \$5,888 and includes the statement "The above values are based on appraisal by staff appraisers of the Bureau of Indian Affairs," but no appraisal report was made a matter of record. The inventory does include the following statement:

March 24, 1972. I hereby certify that the foregoing is an accurate inventory, according to the records of the Yakima Indian Agency, Toppenish Washington, of the trust or restricted property or interests therein, owned by Morris A. Charles, Yakima Allottee No. 124-4247, at the time of his death November 23, 1964.

This language does not indicate what date was used as the controlling date for fixing the valuation given.

Without any further proceedings, on May 12, 1972, Examiner Montgomery issued a Supplemental Order of Distribution, wherein he made a finding that the Yakima Tribe acting by and through its Land Committee, had "* * * elected to purchase those certain trust properties of the above entitled estate * * * said properties being more fully described in the inven-

tory and appraisal attached hereto and by this reference made a part hereof * * *." He makes a further finding that certain documents had been filed including the said tribal election, "the appraisal" [*sic*] (inventory) and the voucher transfer of purchase money in the amount of \$5,880.10, in the hands of the Superintendent from the Tribal account to the account of the estate, all in keeping with the provisions of the Act of December 31, 1970. He then stated:

IT IS HEREBY ORDERED, all right, title and interest in said trust properties as more fully described in the inventory attached hereto is vested in the Yakima Tribe, and the Superintendent of the Yakima Indian Agency shall cause to be made a distribution of the trust fund so deposited to the heir or devisee entitled thereto in keeping with the order of distribution of March 31, 1972, * * *. (Italics supplied.)

On July 17, 1974, Philip Brendale, as the Executor of the *Estate of Caroline B. Charles, deceased*, filed a petition for reopening of this probate reciting that Caroline Charles, who was the sole devisee of this decedent, had died June 25, 1972, leaving a will by which she had named the petitioner as executor and as her sole devisee.

He alleges that the order of distribution in this estate issued March 31, 1972, required distribution of the $\frac{3}{8}$ interest in the allotment of Mary Charles to the said Caroline subject to the Yakima Tribe's option to purchase. He further alleges that the appraisal for the purpose of fixing the probate fee in this estate was computed as

of November 23, 1964, the date of death of this decedent; that the Administrative Law Judge confirmed the purchase on May 12, 1972, without hearing or notice to Caroline B. Charles, then still living; and that the only notice Caroline B. Charles received regarding the purchase was that certain moneys had been credited to her account by the Superintendent.

The principal allegation is that at the time the tribe elected to take the interest from Caroline Charles, almost eight years after the death of this decedent, the value of the $\frac{3}{8}$ interest to be taken had increased six-fold. He shows that no hearing or opportunity for the taking of evidence as to "fair market value" was provided.

The allegations in the petition for reopening are substantially the same as the allegations contained in the complaint in the civil action filed in the United States District Court, *Brendale, Executor v. United States, supra*. He asks that relief be granted and that the tribe be required to pay the fair market value as determined by an Administrative Law Judge after appraisal pursuant to the provisions of the Act of December 31, 1970, *supra*. But the pleadings are limited to the $\frac{3}{8}$ interests in the allotment of Mary Charles, A.L. 4244.

The following additional findings are made:

1. This proceeding is one where possible manifest injustice has occurred which may be corrected by further proceedings after reopen-

September 12, 1974

ing pursuant to 43 CFR 4.5 and 43 CFR 4.242(h).

2. If further proceedings in the *Estate of Cecelia Smith (Borger)*, Deceased Probate No. E 182-59, after reopening, confirm the record before the Board, the inventory of the interests in the allotment of Mary Charles vested in this decedent at his death will be increased by $\frac{1}{8}$. The order of distribution therein will be modified *nunc pro tunc* accordingly making additional distribution of a $\frac{1}{8}$ interest in the allotment of Mary Charles to this decedent.

3. The reopening of this proceeding will then be necessary and proper to make the additional interest available in this estate to the Yakima Tribe under the Act of December 31, 1970, *supra*.

4. Notice is taken of the record in the *Estate of Caroline J. Charles (Brendale)*, Deceased, Probate No. IP PO 48K 74, and the showing there that on February 28, 1974, the Yakima Tribe did elect to take the $\frac{1}{8}$ interest in the allotment of Mary Charles as it appeared to vest in Caroline B. Charles by the will of Cecelia Smith (Borger), deceased, rather than by the will of Morris A. (K.) Charles, the decedent herein.

5. Notice is taken that the Tribe has filed a general written election to take and pay for all interests which may become available to it on the Yakima Reservation under the provisions of the Act of December 31, 1970, *supra*. The date of tak-

ing of *all* of the interests available in this estate *nunc pro tunc* is determined to be the date of the entry of the Supplemental Order of Distribution by Judge Montgomery on May 12, 1972.

6. No adequate opportunity has been afforded to the parties in interest herein to present evidence of the value of the land interests. Lacking a written and signed stipulation as to fair market value after appraisal a hearing should be held by Judge Montgomery, after notice of not less than 20 days, to receive evidence to support a finding and judgment of the fair market value of the decedent's entire $\frac{1}{2}$ interest in allotment No. 4244 of Mary Charles to be determined as of the date of taking by the Tribe, May 12, 1972.

7. The funds from the Tribe heretofore received in the account of this estate should be credited to and considered to apply as payment or part payment of the fair market value for the decedent's entire $\frac{1}{2}$ interest in the allotment of Mary Charles when the value is determined.

8. The title to the $\frac{3}{8}$ interest in the allotment of Mary Charles included in the inventory of this Estate was vested in the United States in Trust for the Tribe by the Supplemental Order of Distribution entered on May 12, 1972.

9. The title to the additional $\frac{1}{8}$ interest in the allotment of Mary Charles is vested in Philip Brendale as successor in interest under the will of Caroline J. Charles (Brendale), deceased, approved by

the decision of Judge Montgomery on February 12, 1974, subject to the rights of the Tribe in this estate arising out of the Act of December 31, 1970, *supra*.

10. Within the scope of the inquiry permitted by the findings herein, nothing herein shall prevent proceedings to be conducted in this probate, simultaneously with those in the *Estate of Cecelia Smith (Borger)* and the *Estate of Caroline J. Charles (Brendale)*, nor shall anything herein prevent the successive entry of those orders and decisions necessary to modify and correct all errors found in previous proceedings.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ORDERED:

1. That the probate of the *Estate of Morris A. (K.) Charles, deceased*, shall be reopened by Judge Montgomery except upon good cause shown for not doing so; and

2. That if this estate is reopened, Judge Montgomery shall,

(a) Forthwith issue an order to the Superintendent of the Yakima Agency to procure an appraisal by competent appraisers of the Allotment of Mary Charles No. 4244 described as the SW $\frac{1}{4}$ sec. 8, T. 7 N., R. 13 E., Willamette Meridian, Yakima County, Washington, to determine its value as of May 12, 1972. There shall be a written appraisal report to be retained at the Yakima Agency subject to inspection and copying by interested parties. A

summary shall be filed with the Judge and furnished by the appraisers and distributed to all parties in interest immediately upon the filing of the report;

(b) Mail a copy of the above order to the petitioner's attorney of record who may procure an independent appraisal report if he so desires, and a summary of any such report obtained by him shall be filed with the Judge and distributed to all parties in interest;

(c) Determine the fair market value of the interest shown to have been held by this decedent at his death after the filing of the appraisal report procured by the Superintendent and any report submitted by the petitioner. Fair market value may be determined upon stipulation entered into in writing and made part of the record; or if no stipulation is offered, he may make a determination after a full hearing, after notice, wherein each party shall have full opportunity to present evidence of value;

3. On August 30, 1974, new regulations were published in 39 F.R. 31635 in final form, effective September 30, 1974, as to all pending matters arising under the Act of December 31, 1970 (84 Stat. 1874; 25 U.S.C. § 607). These appear as a new addition to 43 CFR 4 subpart D beginning with § 4.300. After the effective date of these regulations, if the Tribe wishes to defer payment of the full amount of the fair market value beyond 20 days following entry of the decision as to value under the new regulations, it may

(YAKIMA ALLOTTEE NO. 4247, DECEASED)

September 12, 1974

timely petition the Judge for the entry of an order providing therefor.

IT IS FURTHER ORDERED that he shall issue a decision final for the Department subject to the right of appeal as provided in 43 CFR 4 subpart D, but the requirement for the filing of a petition of rehearing prior to appeal is waived.

This decision is final for the Department of Interior.

DAVID J. MCKEE,
Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

APPENDIX A

February 6, 1959

Superintendent
Yakima Indian Agency
Toppenish, Washington

RE: Cecelia Smith Vergote
Yakima No. 4161

Dear Sir:

Please examine the roll of tribal membership prepared under the Act of August 9, 1946 (60 Stat. 969), and advise whether the following named individuals, who appear to be probable heirs in this estate, are enrolled members of the Yakima tribes, of $\frac{1}{4}$ or more degree of Indian blood of such tribes, as required by section 7 of that Act:

Mary Andle, Niece
Caroline Charles, Niece
Morris Charles, Brother
Frank (Phillip) Charles (born 1893),
Nephew

Rosa Mamie Cashner Simmons (Rose C. Mitchell), Niece (adopted)

Sincerely,
R. J. MONTGOMERY,
Examiner of Inheritance.

RJM:nb

I certify that the above named persons are not eligible as required by the said Act to inherit in the above estate. EXCEPT Morris Charles ($\frac{1}{4}$ Yakima) and Caroline Charles ($\frac{1}{4}$ Yakima), whom are eligible as required by the said act to inherit in the above estate.

APPENDIX B

April 11, 1969

Mr. Arthur W. Kirschenmann
Attorney at Law
Yakima Legal Center
303 East "D" Street
Yakima, Washington 98901

Dear Mr. Kirschenmann:

You have appealed from the Acting Assistant Commissioner of Indian Affairs' decision of August 6, 1968, which upheld the Acting Deputy Assistant Commissioner's affirmance of the action taken by the Yakima Tribal Council to lower the Yakima blood degree of Caroline B. Charles from $\frac{1}{4}$ to $\frac{1}{2}$ degree. You base your appeal upon your belief that the tribal council's action in correcting the degree of Yakima blood ascribed to your client was of a judicial nature rather than the mere rectification of a clerical error in the membership records.

As part of its internal sovereignty and in the absence of express statutory provisions or Federal regulations to the contrary, the Yakima Tribal Council has full power to correct clerical errors affecting the descent and distribution of the property of its members. More than that, the Yakima Tribal Council would be remiss in its responsibility to all of the tribal members were errors affecting the descent and distribution of property of the members not corrected. Nothing in the

Act of August 9, 1946 (60 Stat. 969), which authorizes and directs the preparation of the Yakima membership roll, prohibits the tribal council from making corrections of clerical errors and the policy of the Bureau of Indian Affairs, as indicated in the Acting Assistant Commissioner's letter of August 6, would not operate to prohibit such corrections of clerical errors.

We concur in the Acting Assistant Commissioner's finding that the tribal council's procedure in changing Miss Charles' degree of Yakima blood was inadequate inasmuch as no follow-up attempt was made to locate her to advise her of the change. However, the responsibility for keeping tribal governing bodies advised of current addresses necessarily lies with the tribal members themselves and the Yakima Tribal Council cannot be held solely responsible for not knowing the whereabouts of your client. Your client apparently neglected to inform the postal authorities of her change of address and as a result, the letter addressed to her by the tribal council could not be forwarded to her. In any event, this lack of proper notification was remedied when Miss Charles was offered an opportunity to present evidence bearing on her blood degree to the Commissioner.

Your client was enrolled under the provisions of Section 1(a) of the Act of August 9, 1946, which pertains to the enrollment of Yakima allottees. That action does not require the minimum possession of any degree of Yakima blood as a prerequisite for enrollment.

Your contention that the Commissioner of Indian Affairs had confirmed Miss Charles' degree of Yakima blood by approving the supplemental roll which contained her name cannot be upheld. The Commissioner approved her enrollment because she was an original allottee and, therefore, met the provisions of Section 1(a).

The record indicates that in her application for enrollment with the Yakima Tribes dated July 27, 1955, your client claimed only $\frac{1}{8}$ degree Yakima blood.

The Yakima-Tribal Enrollment Committee erred when it enrolled her as $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually. When your client was notified by the Chairman of that committee on February 28, 1956, that her application had been accepted and that she was found to possess $\frac{1}{4}$ degree Yakima and $\frac{1}{4}$ degree Nisqually blood, she should have advised the enrollment committee of its error. The letter dated February 28, 1956, specifically allowed 30 days for corrections to be made on the findings of the enrollment committee. Miss Charles did not advise the enrollment committee of its error and allowed that error to go uncorrected for years, accepting those benefits that should rightly have accrued only to those members of the Yakima Tribes who possessed at least $\frac{1}{4}$ degree Yakima blood.

Based on the foregoing, we conclude that the determination of the Acting Assistant Commissioner should be sustained. Your appeal is dismissed.

Sincerely yours,

HARRISON LOESCH,

Assistant Secretary of the Interior.

APPENDIX C

November 14, 1966

Mr. Arthur W. Kirschenmann
Attorney at Law
303 E. "D" Street
Yakima, Washington

Dear Mr. Kirschenmann:

This replies to your letter of October 31, 1966, transmitting therewith an appeal by Caroline Charles, Yakima allottee No. 4240.

We have today referred this matter for appropriate disposition to the Commissioner of Indian Affairs, who has jurisdiction over proposed modifications in the blood quantum shown for individuals on the Yakima roll prepared pursuant to the Act of August 9, 1946, 60 Stat. 963.

We are also sending a copy of this letter to Hearing Examiner Montgomery

September 12, 1974

so that he will be advised that Miss Charles is appealing from the redetermination of her Yakima blood quantum and will therefore be able to coordinate his handling of the estate of Morris Charles with Miss Charles' appeal.

Sincerely yours,

Duward R. Barnes,
Assistant Solicitor,
Appeals & Litigation.

3/31/72: This is the last information we have in the record regarding the appeal. However, Tribal Operations in the Central Office in Washington, D.C. advised this office on 3/24/72, that the appeal had been denied by the BIA.

R. J. Montgomery,
Hearing Examiner.

**ESTATE OF RUTH NAHCOTATY
(WILLIAMS OR DAUKEI)
(DECEASED CADDO ALLOTTEE
NO. 19)**

3 IBIA 105

Decided *September 12, 1974*

Appeal from an Administrative Law Judge's decision denying petition for rehearing.

AFFIRMED AND DISMISSED.

1. Indian Probate: Rehearing: Timely Filing—370.1

A petition for rehearing filed with an Administrative Law Judge was properly denied by the Judge where the petition was not filed within the period prescribed by the applicable regulations.

APPEARANCES: Leroy Irwin Williams, appellant, pro se, Justus Hefley for Cynthia Ruth Williams, appellee.

**OPINION BY ADMINISTRATIVE
JUDGE WILSON
INTERIOR BOARD OF
INDIAN APPEALS**

Leroy Irwin Williams, herein-after referred to as appellant, has filed with this Board an appeal from an Administrative Law Judge's denial of his petition for rehearing. According to the record, Ruth Nahcotaty (Williams or Daukei), hereinafter referred to as the decedent, died testate July 24, 1973, at the age of 72, a resident of the State of Oklahoma. A hearing was duly held and concluded at Tulsa, Oklahoma, on December 7, 1973, for the purpose of ascertaining the heirs at law of the decedent, considering claims against the estate, if any, and to probate the purported last will and testament dated September 17, 1971.

Thereafter, on December 28, 1973, Administrative Law Judge John F. Curran issued an Order Approving Will and Decreeing Distribution. The said Order became final on February 26, 1974.

The appellant, one of the devisees under the decedent's last will and testament, filed a petition for rehearing in the matter under date of May 31, 1974 alleging in support thereof the following reasons:

* * * I request an order for rehearing in the above estate in order that I may submit new evidence. I will supply witnesses who will testify that it was the intention of my mother, Ruth Nahcotaty to will me the property described as W/2 NE/4, NE/4 NE/4, NW/4 SE/4 NE/4, S/2

NE/4 SE/4 NE/4, NW/4 NE/4 SE/4 NE/4, S/2 S/2 NE/4 NE/4 SE/4 NE/4, N/2 N/2 NE/4 NE/4 SE/4 NE/4, N/2 S/2 SE/4 NE/4, N/2 SE/4 SE/4 SE/4 NE/4, SW/4 SE/4 SE/4 NE/4 and S/2 SW/4 SE/4 NE/4 of Section 27, Township 8 North, Range 12 West of the Indian Meridian, in Oklahoma, containing 157.50 acres, more or less. I also have witnesses who will testify that Cynthia Williams, my daughter coerced by mother to make a will naming her beneficiary to said property under threat of bodily harm.

The Administrative Judge under date of June 14, 1974, denied appellant's petition for rehearing on the following grounds: (1) the "Motion for Rehearing" was not timely filed and the Order is final and conclusive, and cannot be modified or vacated (43 CFR 4.241). Furthermore, the movant testified that he had no objection to the will "because after I talked with my mother, why she told me what she would like to have and what she wanted, and at first I was a little hesitant about it, but after considering it was her will and her wishes so then I know that she did it."

It is from the foregoing denial of June 14, 1974, that the appellant has appealed to this Board.

[1] An examination of the record clearly indicates that the petition for rehearing was not timely filed with the Administrative Law Judge in compliance with 43 CFR 4.241 and that the Administrative Law Judge properly denied the petition. The Department has long adhered to the rule that a petition not timely filed is subject to dismissal. In the case of *Agatha Quiltairre (Qual-tier)*, IA-114 (January 11, 1954), it

was held that a petition for rehearing filed with an examiner of inheritance was properly denied by the examiner where the petition was not filed within the period prescribed by the applicable regulations. *See also Estate of Henry Amarty*, IA-879 (July 17, 1959).

Having considered the appeal, the Board can see no compelling reasons to deviate from the rule heretofore adhered to by the Department. Accordingly, the Administrative Law Judge's decision denying the appellant's petition for rehearing should be affirmed and the appeal dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge, dated June 14, 1974, be and the same IS HEREBY AFFIRMED and the appeal herein IS DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

3 IBMA 319

Decided September 12, 1974

Appeal by Eastern Associated Coal Corporation from a decision upholding the validity of a section 104(a) closure

September 12, 1974

order and dismissing an Application for Review in Docket No. HOPE 73-387.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Evidence of a loose, drummy, sagging coal roof, which an inspector reasonably believes may fall at any moment, is sufficient to warrant the conclusion that the danger of roof collapse was imminent.

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; J. Philip Smith, Esq., Assistant Solicitor, Mark M. Pierce, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Eastern Associated Coal Corporation (Eastern) appeals to the Board seeking the reversal of an adverse decision in Docket No. HOPE 73-387 upon its Application for Review of an imminent danger withdrawal order issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(a) (1970). Inspector Jules Gautier issued the closure order at Eastern's Kopperston No. 2 mine and cited the following condition:

Loose unsupported coal roof and loose rock ribs were observed in the 6 left new way from the entrance to the exit a total distance of 700 lineal feet. (Govt. Ex. 1.)

The Administrative Law Judge set forth findings of fact, conclusions of law, and a statement of reasons supporting his decision in conformance with requirements of the Administrative Procedure Act, 5 U.S.C. § 557, and under our decision in *Associated Drilling Co., Inc.*, 2 IBMA 95, 80 I.D. 317, CCH Employment Safety and Health Guide, par. 15,747 (1973). In its brief on appeal, Eastern makes several allegations of error, which, with but one exception, are without merit and too insubstantial to require discussion. Eastern contends in substance that the Judge was in error and could not adequately support his ultimate finding of fact, numbered 12, wherein he concluded that the loose coal roof cited by the inspector " * * * could reasonably be expected to cause death or serious physical harm before it could be abated."

[1] Contrary to Eastern's argument, we think that the Judge's finding is supported by the record. As the Judge pointed out in his opinion, the credible evidence reveals that a portion of the roof was sagging and that a sound vibration test by the inspector showed the roof to be "loose and drummy." (Dec. 3.) Moreover, Inspector Gautier clearly indicated that in his judgment the roof could fall at any time. (Tr. 17.) Accordingly, we find on the basis of this record that a reasonable man, given a qualified inspector's education and experience, was warranted in concluding that a roof fall was imminent, that is to say, it was like-

ly to occur at any moment. *See Freeman Coal Mining Corp.*, 2 IBMA 197, 80 L.D. 610, CCH Employment Safety and Health Guide, par. 16,567 (1973).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-entitled docket IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, Jr.,
Chief Administrative Judge.

DUNCAN MILLER

17 IBLA 128

Decided *September 12, 1974*

Appeal from a decision by the Eastern States Office, Bureau of Land Management, dismissing appellant's protest against the rental rate on noncompetitive oil and gas lease on acquired lands ES 12945.

Affirmed.

1. Mineral Leasing Act for Acquired Lands: Generally—Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Future and Fractional Interest Leases—Oil and Gas Leases: Rentals

Where the United States owns 100 percent of the gas and 50 percent of the oil in a tract of acquired land, rental for an oil and gas lease on such land will

be based on the larger fractional interest owned by the United States, and not on an average of the separate fractional interests.

APPEARANCES: Duncan Miller, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The drawing entry card filed by Duncan Miller in the October 1973 simultaneous filing procedure, List 73-10, of the Eastern States Office, Bureau of Land Management, was granted first priority to Parcel 11 containing 1,189.98 acres of acquired lands within Kisatchie National Forest, Natchitoches Parish, Louisiana. Within the allotted time after notice that payment of the first year's rental of \$595 was due, Miller, under protest because of the United States having only 50 percent of the oil in the leased tract, submitted the required payment of \$595. Lease ES 12945 was issued as of February 1, 1974, for the described area of 1,189.98 acres in which it was stated the United States interest as to oil is 50 percent and as to gas is 100 percent.

On February 14, 1974, Miller reiterated his protest, which the Eastern States Office, by decision dated April 1, 1974, dismissed. An appeal to this Board followed.

Appellant argues essentially that the rental charge should be based only on the 50 percent interest of the United States in the oil because oil is the most reasonably expected

September 12, 1974

potential production from the leased lands. He gives no authority to support his contention.

The Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1970), provides that oil and gas deposits in acquired lands shall be leased under the same conditions as contained in the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (1970). Section 17 of that Act, 30 U.S.C. § 226(d) (1970), provides that all leases of oil and gas lands shall be conditioned upon payment of rental of not less than 50 cents per acre annually.

[1] The regulations, at 43 CFR 3103.3-3, provide that rentals and royalties payable for land in which the United States owns an undivided fractional interest shall be in the same proportion to the rentals and royalties provided by the regulations as the undivided fractional interest owned by the United States in the oil and gas is to the full interest. We construe this to mean that if the United States owns 50 percent of both the oil and the gas, the rental charged for a non-competitive oil and gas lease would be 50 percent of the 50 cents per acre annually. But in the situation where the United States owns 50 percent of the oil and 100 percent of the gas, we do not construe the regulation to mean that the rental should be based on an average of the different interests owned by the United States. Where the United States owns 100 percent of either the oil or the gas, the rental will be charged at the regular per acre rate

of 50 cents annually. Authority does not exist under the mineral leasing laws to issue leases for oil interests separate and apart from gas interests. *Cf. Continental Oil Company*, 74 I.D. 229 (1967).

Furthermore, we point out that where horizontal segregation has been made in oil and gas lease, the resulting leases are chargeable with rental based on the surface acreage, even though this entails double rental payment for the land involved. *Buttes Gas & Oil Company*, 13 IBLA 125 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

UNION CARBIDE CORPORATION

3 IBMA 314

Decided September 12, 1974

Appeal by Union Carbide Corporation from a decision by an Administrative Law Judge dated March 28, 1974, assessing penalties in the sum of \$2,400 for violations of the Federal Coal Mine Health and Safety Act of 1969, under Docket No. 72-274-P.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The decision in *United States v. Finley Coal Company*, 493 F.2d 285 does not bar enforcement of section 304(a) of the Federal Coal Mine Health and Safety Act. 30 U.S.C. § 864(a).

2. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The decision in *United States v. Finley Coal Company*, 493 F.2d 285 relates solely to the regulations codified at 30 CFR 75.400 and does not invalidate any other regulations codified in other sections of 30 CFR Part 75.

APPEARANCES: Benjamin D. Tissue, Esq., for appellant, Union Carbide Corporation; John H. O'Donnell, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The alleged violations of the Federal Coal Mine Health and Safety Act of 1969 (Act)¹ involved in this appeal are listed in Order of Withdrawal No. 1 HSC, April 7, 1971, issued at Union Carbide Corporation's (Union Carbide) Morris Fork No. 7 Mine. A hearing was held before an Administrative Law Judge (Judge) on May 8, 1973, at Charleston, West Virginia. In his

initial decision, the Judge assessed penalties, *inter alia*, for violations of 30 CFR 75.301, 75.302, and several violations of 75.400.

Union Carbide's sole contention on appeal is that no penalties should have been assessed on the ground that the above-cited regulations were invalidated by the decision in *United States v. Finley Coal Company*, 493 F.2d 285 (6th Cir. 1974).

The Mining Enforcement and Safety Administration (MESA) contends that the Judge's decision should be affirmed on the ground that the decision in *Finley, supra*, is not applicable to the regulations charged to be violated in the present case.

The Board notes first that Union Carbide does not dispute the evidence presented by MESA at the hearing in support of the violations charged; nor does it take issue with the Judge's evaluation of this evidence, or with his findings, conclusions, or individual assessments. Union Carbide's appeal is based solely on the decision in *Finley*. As discussed below, the Board concludes that Union Carbide's reliance on *Finley* is misplaced and that the decision appealed from should be affirmed.

The violations charged and proved against Union Carbide related solely to the statutory provision, section 304(a) of the Act, 30 U.S.C. § 864(a), prohibiting accumulations of coal and coal dust, and not to sections 75.400-1 or 75.400-2 of the regulations.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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[1] In our opinion, the decision in *Finley* is limited to invalidating two regulations: 30 CFR 75.400-1, a definitional section, and 30 CFR 75.400-2, requiring a program for the cleanup of coal and coal dust. It does not apply to 30 CFR 75.400 which is a mere restatement of sec. 304(a) of the Act requiring that coal and coal dust, as well as other combustibles be cleaned up and not permitted to accumulate.² Since it is section 75.400, not 75.400-1 or 75.400-2, which was found to be violated in the present case, *Finley* is no bar to enforcement.

[2] In response to Union Carbide's suggestion that the decision in *Finley* applies also to 30 CFR 75.301 and 75.302, we need only quote from that decision:

Only the regulations codified at 30 CFR 75.400 are at issue on this appeal. We are not called upon to consider, and we intimate no view concerning, the validity of any of the other regulations promulgated in November 1970 and codified in other sections of 30 CFR, Part 75.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision IS AFFIRMED.

C. E. ROGERS, Jr.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

HUDSON INVESTMENT COMPANY,
ET AL.

17 IBLA 146

Decided September 13, 1974

Appeal from decision of Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, Portland, Oregon, rejecting application OR 7654 for issuance of an amended patent to an Oregon Donation Land Claim.

Affirmed.

1. Surveys of Public Lands: Generally

The rule of priority in resolving an internal inconsistency on the face of the official plat of survey is that the more reliable calls for distance prevail over the computation of acreage.

2. Patents of Public Lands: Generally—Surveys of Public Lands: Generally

Where the extent of an Oregon Donation Claim was determined in the issuance of the certificate and patent by the correct choice between the inconsistent distance calls and acreage computation on the official plat of survey, the action was proper and did not constitute a resurvey of the claim.

3. Applications and Entries: Amendments—Applications and Entries: Relinquishments—Federal Employees

² The Court stated:

"It is equally clear that the regulations challenged in this appeal [75.400-1 and 75.400-2] were intended to be amendments and revisions of statutory standards. 30 CFR § 75.400-2 imposes a requirement additional to those imposed by Congress in § 864(a) [304(a) of the Act]. The statute requires only that coal dust be cleaned up and not be permitted to accumulate. It does not require, as did the regulation, that a 'regular cleanup' program be established, maintained and made available to the Secretary." * * *

and Officers: Generally—Public Lands: Disposals of: Generally—Regulations: Generally

In the absence of proof of a general administrative practice to notify claimants who file notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown sufficient to overcome the presumption of administrative regularity, and sufficient to warrant an amendment of the patent.

4. Applications and Entries: Amendments—Patents of Public Lands: Amendments

An application for amendment of patent by the successors of an Oregon Donation Claim patentee is properly rejected when the applicants request patent to land to which the original settler was not entitled because it would have exceeded his statutory entitlement.

5. Patents of Public Lands: Amendments—Surveys of Public Lands: Generally

When a patent was issued in conformity with the duly approved survey at the time of the grant, the rights of patent amendment applicants are not altered or enlarged by the acreage returns in a subsequent private resurvey.

6. Administrative Authority: Estoppel—Patents of Public Lands: Amendments—Title: Generally

Reliance on erroneous notations in federal and county land records can neither serve to divest the United States of title to land, nor estop the United States from denying that title passed or from concluding that a patent cannot be amended to include certain land.

APPEARANCES: Howard M. Feuerstein, Esq., of Davies, Biggs, Strayer, Stoel and Boley, Portland, Oregon, for appellants; Robert H. Memovich,

Esq., and Joseph B. Brooks, Esq., Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON
INTERIOR BOARD OF LAND APPEALS

In late 1969 the Bureau of Land Management (BLM), while converting land records to microfilm, discovered that Lot 5 of section 4, T. 1 S., R. 1 W., Willamette Meridian, Washington County, Oregon, had never been patented, but was in federal ownership. After some correspondence with the record owners according to Washington County land and tax records, the BLM issued a proposed notice of classification of public land for transfer out of federal ownership, 35 F.R. 6766 (1970), pursuant to the Public Land Sale Act, 43 U.S.C. §§ 1421-27 (1970).

In response, on February 26, 1971, Hudson Investment Company and the other applicants¹ filed application OR 7654 for issuance of an additional or amended patent to in-

¹ The following parties, who have joined as applicants and appellants, assert ownership of, or rights under a contract for sale to Lot 5: Hudson Investment Company and Catherina Albino for Parcel No. 1 (part of Washington County Tax Lot 3800, the major portion of Lot 5 northeast of Walker Road); Ruth Realty Company, Oregon Electric Railway Company, First National Bank of Oregon, Carl R. Windolph and Windolph Brothers Investment Company for Parcel No. 2 (part of Washington County Tax Lot 100, the portion of Lot 5 southwest of Walker Road); and Anthony Gerace for Parcel No. 3 (part of Washington County Tax Lot 300, a triangle of land at the west edge of the portion of Lot 5 northeast of Walker Road).

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clude Lot 5 in a patent of an Oregon Donation Land Claim. The application was filed under the Act of May 24, 1824, *as amended*, 43 U.S.C. § 697 (1970), and 43 CFR 1821.6, which authorize the amendment of entries and patents to correct errors in the description of lands entered and intended to be entered. The statute and the implementing regulations provide for the amendment of patents in cases of mistaken entry upon showing, *inter alia*: (1) how the mistake occurred; (2) that reasonable precaution was taken to avoid the error at the time of entry; and (3) the applicant's "utmost good faith."

On July 21, 1972, the Oregon State Office issued a decision rejecting the application. This decision was vacated in August 1972 at the applicants' written request for reconsideration in the light of additional information to be supplied. After the applicants filed a memorandum in support of the application containing new legal arguments and reasserting those in the original application, the Oregon State Office issued a decision on December 4, 1972, again denying the application, on the grounds: (1) that the additional grant would exceed their predecessor's statutory entitlement; (2) that the applicants failed to show any error or mistake in the description of the land; (3) that they failed to show the utmost good faith; and (4) that they failed to show their predecessor's reasonable precaution to avoid the claimed er-

ror, as required by 43 CFR 1821.6-3 (a).

The applicants filed a timely notice of appeal. By order of this Board they were granted an extension of time to file their statement of reasons for appeal in order to examine land records in the Regional and National Archives. The Regional Solicitor was similarly granted an extension of time to file his answer. By order dated March 26, 1974, this Board granted appellants' request for permission to file a reply brief. Consideration of the case was further postponed pending the filing of an answer to the reply brief by the Regional Solicitor.

The appellants assert that patent to Lot 5 of section 4, T. 1 S., R. 1 W., should have issued to William E. Walker, their remote predecessor in interest,² over 100 years ago. In support of this assertion, appellants have outlined the following chronology of the facts and circumstances showing the nature and source of the claimed error.

On September 27, 1850, Congress enacted the Oregon Donation Claims Act, 9 Stat. 496. Section 5 of the Act, 9 Stat. 498, provided that all white, married, male citizens emigrating to Oregon between December 1, 1850, and December 1, 1853, would be granted 320 acres of public land upon notification of settlement and cultivation to the Sur-

² The regulations provide for the issuance of amended patent to transferees of the original entryman; 43 CFR 1821.6-3(c)(1), and allow the patent to issue in the name of the transferees. 43 CFR 1821.6-3(c)(2).

veyor General, and upon completion of the survey of the claimed lands, one half to the husband, and the other half to the wife in her own right. No person was to receive a patent for more than one donation in his or her own right. William E. and Hannah Walker, according to the affidavits filed in support of their claim, arrived and settled in the Willamette Valley in the winter of 1852-53 (Ex. H submitted with statement of reasons for appeal, hereinafter S/R Ex.). On March 14, 1853, William Walker filed a notification of settlement which was improperly captioned "Township 1 S., R. 1 W." only, although it described lands in T. 1 N. as well (Ex. A submitted with original application, hereinafter App. Ex.). In July 1853 William Walker executed a new notification (App. Ex. B) with a proper township caption that described the following lands:

SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 33 T. 1 N., R. 1 W.
S fractional $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 32 T. 1 N., R. 1 W.

W fractional $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 4 T. 1 S., R. 1 W.

E $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 5 T. 1 S., R. 1 W.

E $\frac{1}{2}$ of W $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 5 T. 1 S., R. 1 W.

and vacant land adjoining on the South to make 320 acres.

The vacant land adjoining on the south to which the Walkers laid claim was delimited by the June 1853 survey of the claim of Lawrence Hall, the Walkers' neighbor to the south (S/R Ex. G).

On October 31, 1862, the Register and Receiver of the then Oregon

City Land Office issued Donation Certificate No. 1303 to Mr. and Mrs. Walker. The Certificate described the lands according to the lot numbers assigned on the survey plats for the two townships in question³ as follows:

Lots No. 1 & 2 of Section 32 T. 1 N., R. 1 W.=59.20 acres;

Lot No. 1 of Section 33 T. 1 N., R. 1 W.=39.60 acres;

Lot No. 2 of Section 4 T. 1 S., R. 1 W.=39.15 acres;

Frl. NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 4 T. 1 S., R. 1 W.=38.92 acres;

Frl. E $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 5 T. 1 S., R. 1 W.=78.98 acres;

& Lots No. 1, 2 & 3 of Sec. 5 T. 1 S., R. 1 W.=63.01 acres.

Containing 318.86 acres.

(App. Ex. C). The Certificate did *not* include Lot 5 of section 4, T. 1 S., R. 1 W., shown on the 1862 survey plat as containing 12.33 acres. Appellants assert their right to an amended or additional patent to this lot. The lot is a trapezium bounded on the north by Lot 2, section 4, on the west by Lot 3, section 5, both patented to William Walker, and on the south and east by land patented to Lawrence Hall in Donation Claim 43. This parcel will hereafter be referred to as Lot 5.

Appellants assert that Lot 5 was erroneously excluded from William Walker's Certificate and patent because of the surveyor's failure to draft the survey plat for section 32

³ The survey plat of claims in T. 1 S., R. 1 W., Willamette Meridian, was approved as "strictly conformable to the field notes of the survey thereof" by the Surveyor General of Oregon on January 16, 1862 (App. Ex. E). The map of T. 1 N., R. 1 W., was likewise approved September 25, 1862 (App. Ex. F).

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of T. 1 N., R. 1 W., in accordance with the field notes and monumentation of that part of the township. This central error "was compounded by a surprisingly large number of other errors which, taken together, justifiably led the world, as well as Walker, to believe that he had, in fact, been granted Lot 5" (Rebuttal Brief at 2).

The acreage computations in the Donation Certificate reflect the returns marked on the survey plats for the lots in both townships except for the acreage of Lot 1 of section 32, T. 1 N., R. 1 W. This parcel will hereafter be referred to as Lot 1. Lot 1 was computed for the Certificate as 19.20 acres, although the acreage computation on the survey plat is 9.60 acres (App. Ex. F). Apparently the Surveyor's Office used the boundary line calls of the prior surveys surrounding Lot 1 of the Walkers' claim, which were contained in the survey field notes (Ex. 14) and the survey plat (App. Ex. F), to determine that the area of Lot 1 was 19.20 acres.

Using 19.20 acres as the correct area of Lot 1, the issuer of the Certificate apparently determined that under the rule of approximation,⁴ which both parties concede is appli-

cable in such circumstances, Lot 5 could not be included in the donation without exceeding the 320-acre limit of the grant to the donation claimant and his wife.

The omission of Lot 5 from Donation Certificate No. 1303 was repeated in the patent issued to William E. Walker and his wife on March 8, 1866, which described the lands contained in the Certificate and recited that they contained 318.86 acres (App. Ex. D). Under circumstances not disclosed by the record it was discovered that the patent recited that all the land was in T. 1 S., R. 1 W. Although the patent had already been recorded on the T. 1 S. Tract Book (Ex. 6), it was canceled and a new patent was issued on November 11, 1869, correctly describing the townships involved (Ex. 3). This patent again recited that the described lands contained 318.86 acres, and again Lot 5 was not listed.

Appellants' first argument derives from the survey instructions contained in the Act of February 11, 1805, *as amended*, 43 U.S.C. § 752 (1970), which provides in part:

* * * Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return * * *.

Appellants argue that under this Act the Government is bound by its survey return to treat Lot 1 as containing 9.60 acres. They contend

⁴ The rule of approximation requires that when the excess of an entry over the 320-acre limit is greater than the deficiency if the smallest legal subdivision were excluded, then that subdivision must be excluded; but if the excess is less than the deficiency should the smallest legal subdivision be excluded, the subdivision should be included. *Byron K. Baker*, A-28662 (August 2, 1961); *Henry C. Tingley*, 8 L.D. 205 (1889); *Andrew J. Allen*, 7 L.D. 545 (1888); *Henry P. Sayles*, 2 L.D. 88 (1883).

that the determination that Lot 1 contained 19.20 acres was a revocation of the original approval given the survey plat and thus an invalid resurvey.

It has been held by the Department that the approved plat of the official survey, conclusive as to the boundaries and quantity of land, governs the disposal of the lands it covers. *Mason v. Cromwell*, 26 L. D. 369 (1898); *George W. Fisher*, 24 L.D. 480 (1897). A patent duly issued in conformity with the survey incorporates the survey plat. *Cragin v. Powell*, 128 U.S. 691 (1888); *Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co.*, 45 L.D. 330 (1916). The patent issued to William Walker and his wife on November 10, 1869, recited that it was issued in conformity with the official survey plat (Ex. 1, App. Ex. D). Thus, appellants argue, the patent and certificate, using the "wrong" acreage for Lot 1, erroneously recited the acreage granted to the Walkers, and erroneously excluded Lot 5.

Appellants assert that if the 9.60 acres recited on the 1862 survey plat of T. 1 N. is used as the acreage of Lot 1, the lands covered by Donation Certificate No. 1303 amounted to only 309.26 acres, and the Walkers were entitled to all the lands Walker claimed in his notification of settlement. With Lot 5, the Walkers would have received 321.59 acres; it would have been unnecessary under the rule of approximation to exclude either Lot 5 or Lot 1.

The determination that Lot 1 contained 19.20 acres was not a revocation of approval of the survey nor an invalid resurvey, as appellants argue. The Surveyor General approved an internally inconsistent plat of survey for T. 1 N., R. 1 W. The acreage computation for Lot 1 is 9.60 acres, but the distance calls also on the face of the plat indicate that the lot must be about twice that large.⁵ The Register and Receiver who issued Donation Certificate No. 1303 did not resurvey the lot, nor did the Certificate "contain a description which has not been approved by the Surveyor General" (statement of reasons at 9).

The issue presented is thus not whether the Register could recompute or alter the acreage of Lot 1, but whether he correctly resolved an inconsistency on the face of the survey plat that had to be resolved in order to issue the Certificate. We conclude that the Register correctly resolved the inconsistency on the

⁵ The patent and Certificate used 19.20 acres as the area of Lot 1. The Register could have reached this result by treating the lot as a rectangle 20 chains (the east boundary) by 9.60 chains (the south boundary). The BLM decision notes that the lot, because it is not a perfect rectangle, has an area of 19.10 acres, with a north boundary of 9.50 chains, and a south line of 9.60 chains (Dec. at 5). However, the east boundary of Lemuel Sparks' claim in T. 1 N. is 39.25 chains. When the 20 chains on the west side of James Scott's claim, which is north of Lots 1 and 2, are subtracted then the west line of Lot 1 is 19.25 chains, not the 20.00 chains used by the BLM decision. The lot is thus, according to the plat's distance calls, about 18.74 acres. Treatment of the lot as 19.20 acres does not change the application of the rule of approximation or the result in this case. For the purpose of this decision, the 19.20-acre figure will be used in discussing the issues.

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survey plat for T. 1 N., R. 1 W., by using the distance calls in issuing the Walkers' Donation Certificate.

[1] The general rule of priority used in determining the extent of a disputed conveyance is set out in *United States v. Redondo Development Co.*, 254 F. 656, 658 (8th Cir. 1918):

* * * First, natural monuments or objects * * *; second, artificial marks, stakes, or other objects, made or placed by the hand of man, as in this case; third, courses and distances in documents or writings prescribing or reporting the establishment of the lines; lastly, recitals of quantity. [T]he rule * * * proceeds upon considerations of the comparative certainty or fallibility of the evidences of the intention of the qualified authority, public or private, by which the boundary was prescribed. * * *

Accord, Ainsa v. United States, 161 U.S. 208, 229 (1896); *Texas Pacific Coal & Oil Co. v. Masterson*, 160 Tex. 548, 334 S.W. 2d 436, 439 (1960); *Askins v. British-American Oil Producing Co.*, 201 Okla. 209, 203 P. 2d 877 (1949); *Thomsen v. Keil*, 48 Nev. 1, 226 P. 309 (1924); 12 AM. JUR. 2d *Boundaries* §§ 75-76 (1964). See authorities collected in *Coast Indian Community*, 3 IBLA 285, 292 (1971).

The Register properly presaged this rule in choosing to use the more reliable calls for distance rather than the computation of acreage. The record supports the assertion of the Regional Solicitor that the error in the acreage computation for Lot 1 was an error of transcription, not of survey, i.e., the draftsman in the Oregon Surveyor General's office

intended to write 9.60 along the south boundary of Lot 1 to complement the 10.40 call for the distance from the quarter section corner to the east boundary of Lemuel Sparks' claim, so that the south boundary of the southeast quarter of section 32, T. 1 N., could be seen on the map to be regular (*See App. Ex. F*). While it is unnecessary to rule on the exact cause of the mistake in the acreage computation for Lot 1, this explanation strongly supports adherence to the rule that calls for distance, fixed after fewer steps of computation or transcription, are more reliable than computations of acreage.

Adherence to the calls for distance is also supported by reference to the field notes of the approved survey (Ex. 14). The field notes form part of the survey, and are to be considered along with the township survey plat in resolving questions regarding grants of public land. *Heath v. Wallace*, 138 U.S. 573, 583 (1891); *Cragin v. Powell*, *supra* at 696. The field notes for the survey of Claim 59 to the Walkers' west describe an eastern boundary of 39.25 chains, 20.00 chains bordering on James Scott's Claim 58 to the north of the Walkers. This leaves 19.25 chains as the west boundary of Lot 1 (Ex. 1, field notebook pp. 358-59). Similarly, the field notes for the survey of James Scott's claim indicate that the northern boundary of the Walkers' claim in section 32 was 29.50 chains (Ex. 14, field notebook p. 357). The acreage enclosed in such a quadri-

lateral is a approximately the 59.20 acres listed in the Certificate as the acreage of Lots 1 and 2 in section 32, T. 1 N.⁶

[2] When the survey plat accurately reflecting these field measurements was drawn, and Lot 2 was drafted as a regular quarter quarter section (20 chains by 20 chains for 40 acres), Lot 1 necessarily contained the 19.20 acres remaining in the portion of the Walkers' claim in section 32. Thus, when the Register considered the plat in conjunction with the survey field notes, he was constrained to use the distance calls rather than the acreage computation in issuing the Certificate and patent. This did not constitute a resurvey of the claim.

Appellants' second argument is that the crucial "error" analyzed above was compounded by the Register's "arbitrarily omitting Lot 5 from the Walkers' claim even though it was the stated policy of the land office to notify claimants who had claimed too much land and allow them to decide which parcel to omit" (Rebuttal Brief at 4).

This policy is assertedly found in a letter dated January 28, 1854, from the Surveyor General of Oregon (S/R Ex. V), and the practice is exemplified by another letter from the Surveyor General dated March 28, 1854, returning a notification that requested more than 320 acres for a new description including the improvements on the claim (S/R Ex. W).

⁶ See note 5 *supra*.

Appellants argue that if this practice had been followed and the Register had notified the Walkers that their notification claimed excessive acreage, the Walkers would have chosen to include Lot 5 and omit Lot 1 or some other larger lot. The argument is based on the assertion that the Walker home, thought to have been built in 1857 (S/R Ex. U), and barn were on Walker Road on or near the north edge of Lot 5, and the Walkers would have wanted to exclude distant acreage rather than land on or near their barnyard.

In support of their application appellants presented sworn statements by three long-time residents of the Beaverton area taken by the Title Insurance Company of Oregon, to the effect that they recalled the location of the old barn of Robert Walker, son of the donation claimants, and other improvements, and had marked these locations on maps provided for that purpose (App. Exs. J through M-4). The exhibits demonstrate that until 1945, when affiant Edwin A. Neupert demolished it, an old barn then "80 or 90 years old" stood to the south of Walker Road across from the old Walker house, near an existing barn and near the northwest corner of Lot 5 (App. Ex. L. *See* S/R Ex. Z).⁷

⁷ Appellants also rely on the evidence contained in the sworn statements concerning a house and barn no longer extant referred to as the "Lil Barnes" place and a road to the "Garbarino place" around the south border and southeast corner of Lot 5 (App. Exs. J-K, M-1). The record discloses, however, that these uses of Lot 5 occurred subsequent to the 1889 grant of part of Lot 5

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As Lot 5 was the smallest subdivision, it is as logical a supposition that the Walkers would have excluded it, rather than a larger one, as appellants argue. Appellants have not persuasively shown that the Walkers might have wanted Lot 5 if put to a choice. They have also failed to show that error was committed for additional reasons. The exhibits introduced do not support an inference of a binding rule at that time to notify claimants. The "requirement," asserted by appellants, of notice to the claimant followed by selection and relinquishment, does not appear to have been set out as a Departmental rule in approximation cases until *Henry C. Tingley*, 8 L.D. 205, 206-07 (1889). See *May v. Coleman*, 28 L.D. 11, 13 (1899). Cf. *Andrew J. Allen*, 7 L.D. 545 (1888) (notice to claimant to relinquish half of claim because of wife's death); *William Bland*, 2 L.D. 428 (1884) (relinquishment in patent amendment application case).

[3] The Surveyor General's letters relied upon by appellants are not sufficient to show that the proper administrative practice at that time was not followed. The letters did not relate to the Walkers' claim and do not establish a general rule which would be applicable to it. Also, the letters are addressed to someone,

presumably the Register, other than the claimant whose notification was defective. Thus Exhibit W equally supports the conclusion that *the Register* was to approve the new description of the claimed lands. There is a presumption of regularity of administrative proceedings, which is applicable to land office proceedings. *Harkrader v. Carroll*, 76 F. 474 (D. Alas. 1896). See 9 WIGMORE ON EVIDENCE, *Presumptions* § 2534 (3d ed. 1940). Applying the presumption of regularity, we assume that the rule of approximation was applied in issuing Donation Certificate No. 1303, and the Register did consider improvements in making the determination.

Independent of the Register's alleged duty to notify the Walkers, we note that there is no evidence in the record, except the circumstantial evidence that the old barn on or near the corner of Lot 5 might have been erected prior to the issuance of the Certificate excluding Lot 5, that the Register did not consult with the Walkers prior to issuing the Certificate. Appellants have not submitted evidence which demonstrates that error was committed in this regard.

[4] Even if the substitution of Lot 5 for some other lot would have been justified at the time of the issuance of the Certificate and patent, the regulations require that in order for the transferee of an erroneous patent to receive an amended patent, the applicant must be able to reconvey the land embraced in the erroneous patent free of encumbrances. 43 CFR 1821.6-3(c)(1).

from Robert Walker to one J. M. Smith (App. Ex. G). Thus this evidence, while it may tend to show that Robert Walker asserted ownership or possession of Lot 5, does not go to showing any error on the part of the Register prior to issuance of the Certificate in 1862.

William Bland, supra. See *John Crosby*, 3 L.D. 139 (1884). According to the survey plat, which the Register correctly read, if Lot 5 were to be added to the Walkers' patent, the claim would embrace more than 320 acres. Thus in order for amended patent to issue now, the appellants would have to be able to reconvey the donation claim in order to permit the excision of some other parcel so that the Walkers' successors would not receive more than the Walkers' entitlement.⁸ See 43 CFR 1821.6-3(c)(1). This has not been done here. We mention this to point out the difficulties of amending patents long after title has passed from the United States.

Since Lot 1 was properly treated as containing 19.20 acres rather than 9.60 acres, the rule of approximation was correctly applied by the Register to exclude Lot 5 from the 320-acre entitlement of the Walkers. This analysis of the facts and circumstances surrounding the alleged crucial error show that in fact no error was committed in the issuance of the Certificate and patent to the Walkers excluding Lot 5 which would warrant amending the patent. Rather, it appears that Lot 5 was properly and deliberately excluded to avoid an excess of acreage.

⁸ The survey plat governs the disposal of these lands to claimants under the Walkers' entitlement. This issue is discussed *infra*.

The difficulty the distant successor in interest has in meeting these necessary requirements has been noted in another context of the patent amendment regulations. See *Elizabeth B. Poncia*, A-28982 (August 17, 1962); *Henry S. Morgan*, 65 L.D. 284, 288 (1958). This difficulty does not obviate the necessity of compliance in any way.

Appellants' reliance on *Murphy v. Sanford*, 11 L.D. 123 (1890), and *William Bland, supra*, is misplaced (Application at 16-18). In both cases the issuance of an additional patent for omitted land did not present a rule of approximation problem. Appellants have failed to make the showing of error required by 43 CFR 1821.6-3(a).

Because the Walkers were not entitled to Lot 5 in 1862 when the Certificate based on the approved survey plat was issued, their successors in interest can have no right to it now. It is thus unnecessary to determine whether appellants have complied with other requirements of the regulations governing patent amendments, including a showing that reasonable precautions have been taken to avoid error prior to the erroneous entry and that the utmost good faith be shown. 43 CFR 1821.6-3(a).⁹

⁹ Two comments suffice to show some of the additional problems these unreachd requirements pose. Regarding reasonable precaution prior to entry, the Department has noted a number of times the almost insurmountable burden of showing a predecessor's reasonable precautions over 100 years ago. *Faydrew, Inc.*, 14 IBLA 195 (1974); *Elizabeth B. Poncia, supra*; *Harold K. Butson*, A-26285 (December 29, 1951). Here, however, the land was unsurveyed at the time of entry, 1853, and there was no error in the notification of settlement, which served as the entry in this case. The notification did describe both Lot 1 and Lot 5 (App. Ex. B).

On the issue of good faith, appellants would be plagued by: their failure to show with any certainty that improvements were ever located on Lot 5 prior to issuance of the Certificate (App. Exs. K through M-4); the failure of the Walkers and their successors to notice or object to the omission of Lot 5 in the Donation Certificate and the patent, the contents of which were matters of constructive notice to the patentees, *Le Marchal v. Tegar-*

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The BLM decision misleadingly says that "[a]cceptance of the applicants' contentions depends on the correct area of Lot 1 * * *." Appellants' third argument on appeal is that if the BLM can ignore the acreage computation for Lot 1 and resurvey it to find the "correct area," they are entitled to do so with Lot 1 and the rest of the Walker Donation Land Claim. They have introduced the results of a private survey to show that the entire Walker claim, including Lot 5, encompasses 316.28 acres (S/R Ex. X-Z, statement of reasons at 20).

[5] Appellants' reliance on such a resurvey is misplaced. The issue is not the actual area of Lot 1, but what *was* the size of Lot 1 according to the survey plat for the purpose of issuing patent to the Walkers. Rights granted by patent issued under the public land laws in accordance with an approved plat of survey cannot be divested or enlarged by a subsequent public or private resurvey. *United States v. State Investment Co.*, 264 U.S. 206, 212 (1924); *Wiegert v. Northern Pacific Railway Co.*, 48 L.D. 48 (1921); *Isaac T. Wheeler*, 43 L.D. 113 (1914). For instance, in *Mason v. Cromwell*, *supra* at 371, a 40-acre additional homestead entry was denied because the applicant had already received his statutory limit,

den. Tegarden, supra at 685; and the fact that the patent was not recorded in Washington County until 1908 (Brief for Respondent at 18), after the 1889 transfer of a portion of Lot 5 by the Walkers' son and heir (App. Ex. G).

160 acres, in a prior patent to a quarter section homestead. The entryman argued that the quarter section, returned as a regular, 160-acre plot, in fact only contained 120 acres. The surveyor's return was held conclusive, and the entryman was bound by the land description and computation of acreage contained in the survey.

The survey plats for the two townships involved in this case were duly approved, and Donation Certificate No. 1303 and the Walkers' patent issued according to the survey. The Walkers' rights were controlled by the Certificate and patent, and the appellants, their successors, cannot enlarge the Walkers' rights by the assertion that the 1862 survey showed some lots to be larger than their 1973 "resurvey" shows them to be. As we have held above, the Register properly resolved the internal inconsistency in the controlling survey plat by using the more reliable calls for distance, corroborated by the field notes, rather than the acreage computation.

Appellant's fourth argument is that the Government is estopped to deny that the grant of Lot 5 should have been made, or that Lot 5 was granted to the Walkers, asserting the following facts: (1) the Oregon Tract Book for T. 1 S. shows Lot 5 as having been patented to William Walker (Ex. 6); (2) the survey of claims plat for T. 1 N. maintained for public use contains the 9.60-acre computation for Lot 1 (App. Ex. F); (3) the Historical Index maintained by the BLM, current to Feb-

ruary 1971, records that 89.20 acres in T. 1 N., passed under the Walker patent of November 10, 1869, a figure which incorporates 9.60 acres as the size of Lot 1; (4) the Master Title Plat itself recites the acreage of Lot 1 as 9.60 (Ex. 9); and (5) since 1908, Washington County land records have shown Lot 5 to be in private ownership. Appellants claim that they have innocently relied to their detriment on these public records that show that Lot 1 was treated as containing 9.60 acres and that Lot 5 was or should have been properly patented to the Walkers.

However, there is additional material in the record that indicates that this reliance was not so reasonable. The Master Title Plat for T. 1 N. may lead one to believe that Lot 1 was treated as containing 9.60 acres, but the Historical Index for T. 1 S. clearly does not include Lot 5 in the lands patented to the Walkers (Ex. 10). The Oregon Tract Book notation that Lot 5 was patented is marked with the warning that a corrected patent had been issued to Walker (Ex. 6). The Tract Book relied on by appellants contained a reference to the book in which the patent was recorded (Ex. 6). There has been no assertion that the patent itself was erroneously recorded in that book.

[6] 43 CFR 1810.3(c) provides:

Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law.

This regulation and 43 CFR 1810.3 (a) and (b) apply the generally

prevailing judicial rule that laches or estoppel does not apply to the United States. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Atlantic Richfield Co. v. Hickel*, 432 F. 2d 587, 591 (10th Cir. 1970); *Beaver v. United States*, 350 F. 2d 4, 8-9 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). Some recent cases have made inroads on the judicial rule by holding that estoppel can be applied against the Government when its absence would work severe injustice and the public interest would not be damaged by its imposition. *United States v. Lazy FC Ranch*, 481 F. 2d 985 (9th Cir. 1973), *citing Brandt v. Hickel*, 427 F. 2d 53 (9th Cir. 1970).¹⁰ The facts in those cases however, are distinguishable from these, and the general rule applies here. Estoppel cannot be employed in this case without greatly harming the public interest in the public lands. The estoppel asserted here would divest the Government of title to land which was never patented, and to which patent was never earned under the public land laws. The records relied on by appellants might give them protection against bona fide purchasers under state law of constructive notice, but

¹⁰ In *Brandt*, a BLM decision rejecting an oil and gas lease offer asserted that a corrected, refiled offer would not lose priority, contrary to Departmental rule. On appeal from a Departmental decision that reversed the BLM and held the appellant's refiled offer to be junior to an intervening offer, the Government was estopped to deny the BLM assertion, on the grounds that administrative due process had been abused, and the Government was in no way prejudiced by having one, rather than another, qualified noncompetitive oil and gas lease offeror.

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these records cannot be used to assert title against the United States. See *Beaver v. United States*, *supra*.

Title to public lands is granted by patent, not by land records. The grantee and his successors are on constructive notice of the contents of the patent. *Le Marchal v. Tegarden*, 175 F. 682 (8th Cir. 1909).¹¹ As we concluded above, there was no error in the November 10, 1869, patent issued to the Walkers, which did not include Lot 5. As the Walkers were not entitled to Lot 5, the issuance of patent to these appellants based on erroneous land records, would serve to vest rights not authorized by law in violation of 43 CFR 1810.3(c).

Reliance on the erroneous records was in large part unfounded, and estoppel would divest the Government of title to land based on a clerical error in the records, not in the patent. In these circumstances estoppel is unavailable to appellants.

¹¹ Equitable title vests, in such public land entry cases, upon issuance of a final certificate. In this case, by analogy to preemption claims, the final certificate was embodied in Donation Certificate No. 1303. See *Whitney v. Taylor*, 158 U.S. 85, 95 (1895), citing *Orchard v. Alexander*, 157 U.S. 372, 383-84 (1895).

In their Rebuttal brief, appellants place strong emphasis on the assertion that there is no evidence that the Walkers ever received their patent (Rebuttal to Answer at 4-5), so that it is unrealistic for the Government to assert that the Walkers would have relied on their patent rather than their notification to determine the extent of their grant. However, the Walkers were also on notice of the deletion of Lot 5 in Donation Certificate No. 1303, which was issued seven years before the corrected patent. The grantees are equally on constructive notice of the contents of the Certificate. *Le Marchal v. Tegarden*, *supra*, at 691.

Brandt v. Hickel, *supra*; 43 CFR 1810.3(c).

Appellants' final contention is that "[t]he government's attack on William Walker's entitlement to Lot 5 should not prevail because it would unjustifiably destroy public confidence in ancient land records" (statement of reasons at 17). According to appellants, corrective measures such as the BLM land classification in this case would call into question the validity of all government land grants because of the frequency of survey errors in the last century.

Contrary to appellants' contentions, title derived from a government patent is not so vulnerable. After six years from issuance the United States cannot sue to annul or vacate a patent in the absence of a charge of fraud in the procurement of the patent. 43 U.S.C. § 1166 (1970). Once title has been conveyed, the Department of the Interior has no jurisdiction to alter the grant by a subsequent, corrective survey. *United States v. State Investment Co.*, *supra*; *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452 (1903); *Marco Island*, 51 L.D. 322 (1926). In this case, however, the determination that Lot 1 contained 19.20 acres was made before the issuance of the Donation Certificate and the patent, and incorporated in both documents. Appellants were entitled to rely on the patent to the Walkers, but that patent did not include Lot 5. Appellants have not cited any authority, beyond the estoppel argument re-

jected above, for the proposition that reliance on erroneous tract book and master title plat entries (Exs. 6, 9) can be converted into title to the land in question. *See* 43 CFR 1810.3(c). Nor can title to public land be gained alone by adverse possession. *Beaver v. United States, supra*.¹² This argument is not persuasive.

In sum, the record shows that a mistake of transcription was made on the survey plat of T. 1 N., R. 1 W., in 1862, so that the plat bore an acreage computation inconsistent with the distance calls for the boundaries of Lot 1, section 32. The Register, in issuing the Donation Certificate to the Walkers, correctly resolved the inconsistency by using the more reliable distance calls in computing the acreage of Lot 1 as 19.20 acres. The Walkers' Certificate thus did not include Lot 5, section 4, T. 1 S. Under the rule of approximation, the inclusion of Lot 5 would have given Walker and his wife more than the 320 acres to which they were entitled. Because the Walkers were not entitled to Lot 5, appellants have not shown that any error was committed by the land office, and the patent issued to the Walkers on November 10, 1869, correctly described their entitlement. The applicants, as remote grantees from the Walkers, are not entitled to a new or amended patent including Lot 5. Nor can the errors in any

land records showing Lot 1 to contain 9.60 acres and Lot 5 to have passed to Walker estop the United States from denying that patent and title to Lot 5 was issued or should have issued to William Walker and his wife. The decision of the Chief, Branch of Lands and Minerals Operations, correctly rejected the application.

Therefore, pursuant to the authority granted to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

LLOYD L. CLARK

17 IBLA 201

Decided *September 17, 1974*

Appeal from the decision of the District Manager, Coos Bay District, demanding \$2,307.95 as balance due on cruise timber sale.

Affirmed as modified.

1. Timber Sales and Disposals—Words and Phrases

"Cruise sale contract." Form 5430-3 (1966), "Contract for the Sale of Timber, Cruise Sale," is a lump-sum contract for a designated lot of timber in a described area, and the contract price does not

¹² Appellants' "confidence in ancient land records" may be vindicated by an application under the Color of Title Act, *as amended*, 43 U.S.C. § 1068 (1970). Such an application is not now before us.

vary with the quantity or quality of timber actually located therein.

2. Timber Sales and Disposals

In legal effect, a vendor's estimate of quantity or quality of a specific lot of in-place dead or down timber is *sui generis* because certainty cannot be determined except by harvesting and, even then, there is room for disagreement as to whether all merchantable timber was harvested by vendee.

3. Timber Sales and Disposals

Where there has been a specific disclaimer of warranty by vendor-Government as to quality and quantity of specified dead trees in a timber cruise sale contract, the parties are deemed to have contracted on the assumption there was a doubt as to such quality and quantity and the risk with regard to such factors must be considered to have been assumed by vendee as one of the elements of the bargain.

4. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government-vendor in a timber cruise sale contract, only good faith is required of the Government in naming an estimated amount.

5. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government in a lump sum cruise timber sale contract, the vendee is not justified in relying on the Government's estimate of quantity or quality for the parties did not intend the estimate to be a basic assumption of the ultimate agreement.

6. Timber Sales and Disposals—Trespass: Generally

Where a Government estimate in a sale of timber by lot is grossly excessive as to quantity of board feet sold, and cutting of additional timber is authorized in error by a Government timber manager, the Department position as to

damages for trespass should be reexamined to determine whether payment for the additional trees, at the value when cut, may be obtained as a compromise under 4 CFR 103.5 and BLM Manual 5481.12 B and 9230.61.

7. Timber Sales and Disposals

The Government's resale expense should be deducted from the credit granted the vendee of a timber sale contract for timber remaining in place after abatement of the contract.

APPEARANCES: Fred P. Eason, Esq., Coos Bay, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Lloyd L. Clark filed notice of appeal from the decision of the District Manager, Coos Bay District Office, Bureau of Land Management, Oregon, dated March 9, 1972, making demand for \$2,370.95 owing on timber sale contract No. 36120-TS70-77. The alleged debt arose as the result of a sale on May 22, 1970, of dead trees and parts of trees. The Government prospectus said that there were approximately 44 Port Orford cedar trees with an estimated 49 MBF (thousand board feet) of merchantable lumber. The Government estimated the total value to be \$2,082.50 or \$42.50 per MBF. Appellant submitted a bid of \$5,390 or \$110 per MBF, more than double the Government's estimate of value. It should be noted, however, that the second high was \$105 per MBF, also more than double the Government's estimate.

Under the terms of the sale contract, appellant was given five months to remove the timber. Payments were to be made in \$600 increments dependent upon the rate of removal. Additionally, appellant posted a performance bond in the amount of \$1,100.

Appellant proceeded to remove substantial portions of the timber. He made total payments of \$1,800. On August 10, 1970, the District Manager wrote the appellant requesting submission within two days of \$2,400, *i.e.*, four payments. It was noted that, though appellant had removed his equipment, "a number of logs and down trees, which appear merchantable, still remain on contract area along with all the arrowwood." By letter of August 14, appellant replied that he had logged and delivered 16,510 board feet at \$173 per thousand. He admitted that roughly 6 MBF of arrowwood remained but said there was no market for it. He further stated that "Mr. Casey [the BLM Curry Timber Manager] came back and marked a few more trees which came to 3,540 bd. ft." He noted that there was an overall shortage of 22,950 board feet, and he concluded his letter by requesting some adjustment to reflect the real situation.

On August 20 the timber contract was suspended. On December 28 the District Office notified the appellant that his contract had expired on December 2 and that the District Office would determine the credit for timber remaining on the contract area to determine his remaining liability.

On January 5, 1971, the cash bond of \$1,100 was transferred to the timber sale contract. The reappraisal found a total of 7,706 board feet remaining on the land with a current market value of \$276 from which \$26.15 was deducted as the cost to the Government of the appraisal. Regarding the 3,540 board feet marked by the Timber Manager, the District Manager in his decision of January 27, 1972, noted that various provisions of the timber sale contract made clear that the Timber Manager was without authority to authorize the cutting of additional trees. Accordingly, the Manager assessed double damages of \$130.80 for those trees. The District Manager stated that the total debt owing to the United States was therefore \$2,370.95. From this decision appellant has taken an appeal.

Appellant's basic contention is that because of the alleged error as to estimated quantity, there was no meeting of the minds and thus no binding contract was entered into.

[1] Appellant has not alleged that less than the specified 44 Port Orford cedar trees were made available to him. In this sense there was a meeting of the minds and no misunderstanding between the parties. Was the quantity of merchantable lumber to be cut in the future—under the direction and control of appellant—a basic assumption of the contract, or was it contemplated that appellant would assume the risk? The agreement herein was entered on Form 5430-3 (1966), "Con-

tract for the Sale of Timber, Cruise Sale," which is a lump-sum contract for a designated lot of timber in a described area. *John D. Huffman*,⁷ IBLA 190, 79 I.D. 567 (1972). Sale of timber by tree cruise is the general practice of the Department. 43 CFR 5402.1(b) (1970), now section 5422.1 (1973). In a cruise sale, the contract price does not vary with the quantity or quality of board feet actually located in the area designated. Departmental regulations 43 CFR 5441.2(d) (1970), now section 5461.3 (1973), provided in part:

* * * For a cruise sale the purchaser shall not be entitled to a refund even though the amount of timber cut, removed, or designated for cutting may be less than the estimated total volume shown in the contract. * * *

Though the contract referred to an estimate of 49 MBF of merchantable timber, the contract also specifically provided:

Sec. 3. *Installment Payments.* (a) This is a lump sum contract which may be paid in installments as set forth in this section. The following estimates are made solely as an administrative aid in determining when installments become due. * * *

Except as provided in § 2, the Purchaser shall be liable for the total purchase price, even though the quantity of timber actually cut or removed or designated for

taking is less than the estimated volume or quality shown above. (Italics added).

Sec. 7. *Passage of Title, Risk of Loss, and Disclaimer of Warranty.*

(b) * * * Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by the Government.

[2] In legal effect, a vendor's estimate of quantity or quality of a specific lot of in-place dead or down timber is *sui generis*. Certainty as to quantity and quality cannot be determined except by harvesting, and even then, there is room for disagreement as to whether the amount selected, cut and felled by vendee included all merchantable timber. *Raddue v. Le Sage*, 138 Cal. App. 2d 852, 292 P.2d 522 (1956). Given an original inaccuracy of the Timber Manager's estimate, and his statement that appellant "high graded" the tract through selective cutting of only the better timber, the Board is not convinced that the record firmly establishes the deficiency to be in the amount alleged by appellant.

[3] There are numerous cases in which such lump-sum contract, including an express disclaimer of quantity, has been held to preclude recovery for inaccuracies in volume estimates. See, e.g., *John D. Huffman, supra*, which involved an asserted 30 percent variation between the cruise estimate and the board feet actually recovered. See also Bureau of Land Management Manual 5436, wherein the lump sum contract and the disclaimer of warranty

⁷The Board recognizes that among the reasons for preparing estimates of quantity are (a) to provide limited assistance to lumbermen in determining whether or not to consider making an independent evaluation and possible bid; (b) to make the appraisal required by 43 CFR 5420.0-6; and (c) to program required installment payments.

are discussed.² Does appellant's contract permit a different result due to the size of the claimed overestimation? In *Raddue, supra*, the Court construed a private lump sum timber contract somewhat similar to that herein concerned. The deficiency therein was substantially greater than that claimed by appellant. Upon an estimation of 3,500 MBF of merchantable timber, the deficiency was in excess of 2,500 MBF. The Court stated at 292 P.2d 525:

* * * [T]he basic assumption of the quantity was necessarily an approximation and the parties themselves in their pleadings so recognized. Williston on Contracts, Rev. Ed., under the topic "Mistake", in section 1543, says:

* * * * *

"In the first place there must be excluded from consideration mistakes as

² In BLM Manual 5436, Appendix 1, it is stated at page 78:

"Section 3(a) establishes that a contract executed on Form 5430-3 is a 'lump sum' contract. A 'lump sum' contract contemplates payment of a fixed amount regardless of the quantity of timber involved. This contrasts to a contract on a 'scale' or 'unit' basis where the total payment is dependent upon a measure of the quantity of timber actually removed. (See Form 5430-4, Contract for the Sale of Timber—Scale Sale for an example of a 'unit' contract)."

The Manual further provides, at page 92:

"In Section 7(b) the Government disclaims any warranty of the fitness of the timber for any purpose of the purchaser. What does it mean? It means that the Government does not guarantee to the purchaser the quantity or quality of the timber sold. Frequently, our timber sales advertising includes a breakdown of expected log grade recovery. The purpose of the 'disclaimer of warranty' is to expressly deny any representation of implied warranty which may elicit from such advertising. In a nutshell, the 'disclaimer of warranty' precludes the purchaser from making a claim against the Government in the event quantity, quality or fitness of the timber are not up to the purchaser's expectations.

to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. *With respect to any matter not made a basic assumption of the contract the parties take their chances.*" (Italics added.)

Restatement of Contracts, section 502, states:

"* * * [W]here parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable, * * *"

Under Comment *a* the following appears:

"Where both parties assume the existence of a certain state of facts as the basis on which they enter into a transaction, the transaction can be avoided by a party who is harmed, if the assumption is erroneous."

Under Comment *f* the following appears:

"Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain."

The present case is brought within the foregoing rules by the presence in the contract of a provision which demonstrated that the parties considered that their assumption as to the quantity of merchantable timber upon the land might be erroneous. * * *

See also 3 Corbin, *Contracts* § 598 at 585-86 (2d ed. 1960).

Both the contract under consideration (wherein the Government disclaims warranty as to quality and quantity) and the *Raddue* contract (which provides for the consideration to be reduced pro rata if cutting operations fail to yield the estimated amount) recognize that

quantity and quality are uncertain. The parties are deemed to have contracted on the assumption that there was a doubt with regard to such matters. In the Clark appeal, because of the Government disclaimer, the risk as to the quantity of merchantable lumber to be derived from the dead trees would ordinarily be considered to have been assumed by appellant as one of the elements of the bargain.

[4] In *Raddue* the faulty estimate was made by a third party. *Everett Plywood and Door Corporation v. United States*, 419 F. 2d 425, 430 (Ct. Cl. 1969), indicates that the rule is no different where the estimate is made by the seller. In *Everett*, the Court distinguished the contract there under consideration from "the new contract form * * * which clearly negated *any* warranty of quantity." (Italics added.) It is difficult to conceive how the Government disclaimer of warranty could be made more clear than in Bureau of Land Management contract Form 5430-3 (1966) concerned herein.

The Court held that the *Everett* contract was not a sale by specific lot. Again distinguishing, the Court at 432 quoted *Brawley v. United States*, 96 U.S. 168, 171-172 (1877), as to the seller's obligation in a specific lot sale:

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or

correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot, and the naming of the quantity is regarded not as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which *good faith is all that is required of the party making it*. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. (Italics added.)

The contract herein is a sale of a specific lot. Appellant alleges no bad faith; *Brawley, supra*, bars relief.

[5] Just as there has been no allegation of bad faith, neither has there been a showing of reliance. The facts herein are analogous to those in *Brock v. United States*, 84 Ct. Cl. 453 (1937), as discussed in *Everett, supra*, at 433:

The *Brock* case is clearly distinguishable from the [*Everett*] case, as the facts therein show that such plaintiff was plainly not justified in relying upon defendant's estimates as to timber volumes involved, *nor does it appear that the parties intended or expected that the estimated quantities would be the basis of the agreement between them*, and thus a warranty was not made by defendant in the contract. * * * (Italics added.)

The sale herein encompassed a relatively small amount of readily accessible timber. Appellant has not alleged that he relied and did not examine the trees.³ Appellant's

³ Cf. Uniform Commercial Code, § 2-316(b), under which there is no implied warranty for defects which an examination ought to have revealed. As to a sale of standing lumber to be cut by purchaser, see § 2-107.

counsel, in his November 16, 1970, letter to the District Manager, alleged that there "may" have been no meeting of the minds with regard to quantity. In the notice of appeal he alleged that "there obviously was no meeting of the minds with regard to the quantity of timber being sold." No affidavit or other proof was offered, nor is there any clear allegation that appellant in fact relied on the Timber Manager's estimate as to the condition and quantity of merchantable lumber in the dead trees.

The fact that appellant has not alleged reliance is an indication of the understanding between the parties as to their bargain. Even assuming, *arguendo*, that the deficiency does approach 51 percent, this is not controlling. If the Government estimate had been 51 percent *less* than the actual amount of merchantable timber which was later cut, it is doubtful that under the terms of the contract a court would permit the Government to recover an augmented purchase price from appellant—absent a showing a fraud.

Even if appellant had relied on the estimate, the Board finds that appellant was not justified in so relying for the parties never intended the estimate to be an assumed basis of the ultimate agreement or to control the total amount due on the contract. Rather, the parties recognized from the beginning that the quantity of merchantable timber—to be cut in the future under the direction and control of appellant—was not a basic assumption of the contract.

[6] As to the additional timber apparently authorized for cutting by the Timber Manager, that timber may not be given away. Under the circumstances, however, and despite sections 8 and 13 of the contract, we feel that double damages for trespass would be unduly harsh. It is therefore suggested that the Department position be re-examined to determine whether payment for the additional timber, at its realistic value when cut, would be appropriate as a compromise. 4 CFR 103.1 and 103.5;⁴ BLM Manual 5481.12 B and 9230.61.

[7] The Government's resale expense should be deducted, under established procedures, from the credit granted to appellant for that merchantable timber which remained on the site after his departure. *Leslie G. Caughman*, A-30890 (February 21, 1968).

⁴ 4 CFR 103.1 reads in part:

"Scope and Application.

"The standards set forth in this part apply to the compromise of claims, pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, which do not exceed \$20,000 exclusive of interest. The head of an agency or his designee may exercise such compromise authority with respect to claims for money or property arising out of the activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. * * *

4 CFR 103.5 provides:

Enforcement Policy.

"Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JOSEPH W. GOSS,
Administrative Judge.

I CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

Douglas E. Henriques, dissenting.

The instant case presents issues of some difficulty and I sympathize with the majority's attempt to resolve them. Nevertheless, I cannot assent to a decision which, through reliance on the literal terms of a lump sum sales contract, ignores and distorts the real purposes behind the utilization of this contract device.

I have no quarrel with the proposition that in a normal situation a lump-sum contract which contains an express disclaimer of warranty as to quantity precludes recovery for inaccuracies in volume estimates. See e.g., *John D. Huffman*, 7 IBLA 190, 79 I.D. 567 (1972); *Irving Pearce*, 5 IBLA 373 (1972); *Forest Management, Inc.*, A-31045 (February 6, 1970). The rationale for the rules prohibiting recovery for normal underruns is premised on two separate factors. First, the nature of a timber cruise is such that a truly accurate estimate is virtually impossible. Small errors are intrinsic to the process.

Secondly, while many purchasers would be quick to complain of an underrun, few would complain of an excess of timber over the estimate relied upon. Thus, the nature of a lump-sum contract is to apportion between seller and buyer the risks inherent in such a sale.

As I see it, this case presents the question of whether or not as underrun of nearly 51 percent is so great as to support a finding that there was no meeting of the minds between the two parties.¹ I think this is a question deserving of rigorous consideration. I think that it is more than unfortunate that this question is not examined in the majority's analysis, an analysis which I feel places inordinate reliance on specific contract terms to the derogation of simple common sense.

As the majority apparently sees it, the Government's volume estimate is no more than a dart throw by a blind man. Appellant had absolutely *no* right to rely thereon. I doubt that the foresters who made the timber cruise took so critical a view of their official capabilities.

¹ The majority states that "[g]iven an original inaccuracy of the Timber Manager's estimate, and his statement that appellant 'high graded' the tract through selective cutting of only the better timber, the Board is not convinced that the record *firmly* establishes the deficiency to be in the amount alleged by appellant." (Italics added.) The Government has not even alleged that the shortage is less than appellant's contentions. The fact that appellant has "high graded" the tract, however relevant it may be to a question of *quality*, has no bearing on the issue of the *quantity* of the timber involved. Finally, if there is a factual uncertainty the case should be remanded for a hearing. See 43 CFR 4.415.

And I cannot but wonder why government moneys are expended on the making of timber cruises if the results are so unreliable as to be worthy of no reliance.

The short answer to the majority's position is that both parties rely on the estimate. The Government, in its prospectus concerning the timber sale, put a total appraised price of \$2,082.50 on the timber to be sold. This price was arrived at by multiplying the appraised price per Mbf (\$42.50) by the estimated Mbf involved in the sale (49). The prospectus specifically stated that "[n]o sale shall be made for less than the total appraised price." Thus, any bid which did not match the total appraised price, which in turn was dependent on the estimated volume of timber, would be rejected. Certainly this is a form of reliance on the volume estimates. Further, under the category of "High Bid" of Form 5430-7 (January 1969) "Timber Sale Bid Record," a bid of \$110 was recorded for appellant and a bid of \$105 was recorded for one Tom Flood. The total amount bid was reached by multiplying the volume estimate by the amount bid.

Finally, the timber sale contract, Form 5430-3 (July 1966), makes specific reference to both the estimated volume (49 Mbf) and the price per unit (\$110). As a practical matter it is thus clear that reliance is placed by both parties on the estimates of volume made by Governmental employees fulfilling their official duties.

I have stated above that a lump-sum contract containing an express disclaimer of warranty as to quantity operates to preclude recovery for deficiencies in volume estimates *in the normal situation*. Such a result accords with the policy considerations implicit in the utilization of the lump-sum contract to which I have already alluded. The real question which this case presents, as I have noted above, is whether the deficiency evidenced in the instant case is so great as to be beyond the general rule and necessitate reformative action by the Department.² The approach taken by the majority would sanction underruns of 90 percent, for if you have *no* right to rely on an estimate it is irrelevant how erroneous the estimate in actual fact is. Certainly a point must be reached where some reliance on the Government's statements is justifiable.

It may be true, that, in the words of Mr. Justice Holmes, those who deal with the Government must turn square corners,³ but certainly the Government should be held to no less an exacting standard when dealing with its citizens. To blandly say that appellant has made his bargain and should be forced to live

² The majority places heavy reliance on *Raddue v. Le Sage*, 138 Cal. App. 2d 852, 292, P.2d 522 (1956). It points out that in *Raddue* the underrun was far greater than the present case. The relevancy of this observation to the issue before this Board is unclear since in *Raddue* the contract provided for a pro-rata reduction for any underrun of timber. It is the absence of any pro-rata reduction that has generated this appeal.

³ *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

with it is to place the Government in the position of a private party who through slick means has achieved an advantage and intends to maintain it. The Government has a duty to both the public at large and the individual members of the public who deal with it. It should not attempt to benefit the former at the expense of the latter, as if by so doing some greater good is thereby achieved. Rather its obligation is to deal fairly with all its citizens *and* at the same time protect the general public's interest. The general interest in the instant case is to achieve fair market value for Government owned timber. I do not see how this interest is advanced by forcing the appellant to pay for timber that does not now exist and did not exist when the sale was conducted or the contract executed.

The premise of the appellant's bid was that there were approximately 49 Mbf of merchantable timber to be sold. The risk he assumed was that the Government estimate might be moderately deficient. He did not assume the risk that the Government's estimate would be erroneous by more than 50 percent. Whether he did or did not examine the area himself does not make the results of the Government's cruise more realistic.

I note that the majority opinion states that there has been no showing of reliance. Indeed it actually declares that "[t]he fact that appellant has not alleged reliance is an indication of the understanding between the parties as to their bar-

gain." With all deference to the majority I find these statements not supported by the record as shown in the case files. If appellant is not alleging reliance, then on what possible ground is he appealing? Reliance on the Government's volume estimate is implicit in this appeal. That reliance is involved is palpably obvious. Why appellant should be required to clearly allege the obvious is not readily apparent.

I would grant partial reformation of the contract. Appellant bid \$110 per Mbf, and should be held to his bid valuation. It is reported that appellant removed 16,510 board feet; there remained, according to the Government post-sale cruise appraisal, 7,760 board feet. These make a total of 24,216 board feet available under the timber sale contract. At the rate agreed upon this totals out to \$2,663.76. This I believe is the amount for which the appellant should be liable based on the original sale. Added to this should be the cost of post-sale appraisal, \$26.15. I also feel that the trespass assessment was correct. Appellant clearly was on notice that the Timber Manager was not authorized to allow additional cuttings without additional payments. The majority's attempt to mitigate this element because it is "unduly harsh" is, I think, unsupportable in the case law. *See Ray Cole, A-29526* (October 21, 1963).

Accordingly, I respectfully dissent from the majority's opinion.

DOUGLAS E. HENRIQUES,
Administrative Judge.

**ESTATE OF ELIZABETH FRANK
GREENE (GREEN)
(DECEASED NEZ PERCE
ALLOTTEE NO. 1517)**

3 IBIA 110

Decided September 19, 1974

Appeal From an Administrative Law Judge's order denying petition for rehearing.

AFFIRMED and DISMISSED.

1. Indian Probate: Wills: Applicability of State Law—425.4

Limitations prescribed by state law have no bearing on the validity of wills made by Indians in disposing of trust allotments or restricted personal property, unless such provisions have been adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills.

2. Indian Probate: Wills: Applicability of State Law—425.4

Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding.

3. Indian Probate: Appeal: Administrative Law Judge as Trier of Facts—130.3

When the views of witnesses are conflicting, the findings of the Administrative Law Judge, as the trier of facts and as one who had the opportunity to observe the witnesses, shall be given great weight.

4. Indian Probate: Attorneys at Law: Fees—140.2

Claim for attorney's fees for services rendered on an appeal is not a proper

charge or tax as costs of the administration of an estate.

APPEARANCES: Norman L. Gissel, Attorney for Virginia Miller, appellant; Frank V. Barton, Attorney for Arthur Moore, Sr., appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before the Board on an appeal filed by Virginia Miller, hereinafter referred to as appellant, from a decision of an Administrative Law Judge denying her petition for rehearing.

Elizabeth Frank Greene, Nez Perce Indian Allottee No. 1517, hereinafter referred to as decedent, died testate on August 23, 1971, at the age of ninety-four years seised of trust property estimated at \$99,050. The decedent was survived by her son, Arthur Moore, Sr., hereinafter referred to as appellee, to whom the entire estate would descend in the absence of a valid last will and testament.

The matter was first set down for hearing on November 1, 1971, with Frances C. Elge, Administrative Law Judge, presiding. Testimony at this hearing was confined to decedent's family history and to the testimony of the subscribing witnesses to the will, Wallace Wheeler and Mary Moody. Neither the appellant nor the appellee was represented by counsel at this hearing. Thereafter, the first supplemental

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and second supplemental hearings in the matter were scheduled and held on August 23, 1972, and February 28, 1973, respectively, with Administrative Law Judge Robert C. Snashall presiding. The appellee only was represented by counsel at the first supplemental hearing. In the latter hearing both appellant and appellee were represented by counsel.

Based upon the evidence adduced in the proceedings, Judge Snashall on May 1, 1973, issued an order disapproving the decedent's last will and testament of April 8, 1971. The Judge further ordered distribution of the decedent's trust estate to Arthur Moore, Sr., the appellee herein.

The appellant under date of June 25, 1973, filed a petition for rehearing based on the following issues:

I.

That the administrative law judge based his decision in part on the fact that proponent of will had no knowledge of the conditional terms of the will of Elizabeth Frank Greene. Proponent asserts the position that where a conditional beneficiary of a will is ignorant of the terms of the will, said ignorance does not preclude her receiving the benefits of the conditional devise or bequeath when the condition to be performed was in fact performed by said conditional devisee.

II.

That the administrative law judge in holding against the proponent, incorporated the theory of undue influence in his decision. That the proponent respectfully submits that this theory was not before

the court and therefore not a proper theory upon which to render a decision.

III.

That even if the issue of undue influence was properly before the court, the evidence presented by the contestant of the will was not sufficient to prove undue influence.

IV.

That the administrative law judge based his decision in part on the proponent's failure to overcome the heavy presumption of undue influence, said presumption is not reflective of Idaho law which states that the *contestant* of a will that has been admitted to probate has burden of showing undue influence and that burden never shifts to proponent.

V.

That the primary issue before the court was the incompetency of the testatrix, and where the contestant places the issue of incompetency before the court, the burden of proving incompetency is on contestant, and said contestant failed to carry this burden.

VI.

That on first hearing in this matter, both proponent and contestant were without legal counsel; Administrative Law Judge Francis Elge advised only the contestant to seek legal assistance, and only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent, and that this set of facts constitutes prejudicial error on part of administrative law judge.

VII.

That on first hearing in this matter, both proponent and contestant were without legal counsel, Administrative Law Judge,

Frances Elge advised only the contestant to seek legal assistance, and only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent. That there was evidence entered prejudicial to proponent and that proponent was effectively denied right to cross examination, and that this set of facts constitutes prejudicial error on part of administrative law judge.

The Judge in considering the appellant's petition for rehearing consolidated appellant's foregoing seven issues into the following three basic contentions:

* * * (1) that petitioner's asserted ignorance of the provisions of the Will was a basis for denying her the benefits thereof; (2) an improper finding of undue influence and incompetency of the decedent; and (3) alleged deprivation of the right of counsel.

The Judge considered and disposed of the above contentions in the following language:

Petitioner, by her first contention, seems to be contending that the decision was improper because it was at least in part based upon the belief that petitioner should be precluded from receiving benefits of the conditional devise or bequeath because she was purportedly unaware or ignorant of the terms of condition in the Will. Apparently, petitioner misunderstood the Order since no such interpretation or holding was intended. What was stated in the Order, as dicta, was that petitioner by her own testimony, emphatically denied the Will's recital that she understood and agreed to the conditions precedent in the Will and that therefore she could not rely upon those conditions which in that context could only have been considered a bilateral contract. The ultimate fact of her denial was used merely for the purpose of showing the untrustworthiness of her testimony since other evidence clearly showed

not only her complete knowledge of the conditions contained in the Will but her complicity in their creation and publication.

Petitioner's second basic contention is merely an argument on the facts without the introduction of new and additional evidence and is therefore outside the scope of a Petition for Rehearing. The simple fact is that testatrix, due to a number of reasons, was highly susceptible to the suggestions and promptings of the petitioner and that the Will clearly, when laid alongside the evidence produced upon the hearings, reflected the petitioners (sic) heavy hand in the matter. Petitioner wholly failed to overcome this strong presumption of undue influence. *Estate of Mary Ursula Rock Well Known*, (sic) IBIA 70-7 (1971); cf: *Estate of Louis Leo Isadore*, IA-P-21 [1970], *Estate of Julius Benter*, IBIA 70-5 [1970].

Petitioner's third contention concerning deprivation of the right of counsel is without merit. Administrative Law Judge Frances Elge did in fact advise contestant of the Will to seek legal assistance and it appears obvious from the record she did so in view of her knowledge of the complexity of such an undertaking and the need for technical expertise in so doing. It is hard for me to understand how this could be prejudicial to petitioner. Petitioner in her own right elected by her own volition to appear at the first and second hearings without the assistance of trained counsel; that she did so cannot now be used as a means of upsetting an otherwise proper proceeding. She must be held responsible for her own acts and although it may seem incredible that she would undertake to defend a Will contest involving an estate of this magnitude without the assistance of able counsel, she did so elect. Additionally, the record clearly reflects that every effort was made, not only by the hearing Judge but by opposing counsel, to insure to her a fair and impartial hearing and in fact the latter was overly solicitous in this respect. Finally, it should be noted and the record

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reflects, a third hearing was granted primarily due to petitioner's failure to obtain assistance in connection with the first two hearings and as a means of providing her full additional opportunity to come forth with counsel, as she did, and thoroughly present her case.

The Judge on the basis of the foregoing reasons denied appellant's Petition for Rehearing on July 6, 1973.

From the denial of July 6, 1973, the appellant filed the appeal herein assigning in support thereof the following errors:

1. That the administrative law judge based his decision on undue influence when that theory was not properly before the court and therefore was not a proper theory upon which to render a decision.

2. That even if the issue of undue influence was properly before the court, the evidence presented by the contestant of the will was not sufficient to prove undue influence.

3. That the administrative law judge based his decision in part on the proponent's failure to overcome the heavy presumption of undue influence, said presumption is not reflective of Idaho law which states that the *contestant* of a will that has been admitted to probate has burden of showing undue influence and that burden never shifts to proponent.

4. That the primary issue before the court was incompetency of the testatrix, and where the contestant places the issue of incompetency before the court, the burden of proving incompetency is on the contestant, and said contestant failed to carry this burden.

5. That on first hearing in this matter, both proponent and contestant were without legal counsel; Administrative Law Judge Frances Elge advised only the contestant to seek legal assistance, and

only contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent, and that this set of facts constitutes prejudicial error on part of administrative law judge.

6. That on first hearing in this matter, both proponent and contestant were without legal counsel, Administrative Law Judge Frances Elge advised only the contestant to seek legal assistance, and only the contestant sought legal counsel for the second hearing, and that the second hearing was conducted with no legal counsel for proponent. That there was evidence entered prejudicial to proponent and that proponent was effectively denied right to cross examination, and that this set of facts constitutes prejudicial error on part of administrative law judge.

7. That the administrative law judge's decision on petition for rehearing was erroneous on the preceding six issues of this Notice of Appeal.

The Board is not in agreement with the appellant's contention that the theory of undue influence was not properly in issue in the proceedings and therefore an improper theory on which the Administrative Law Judge based his decision. The Administrative Law Judge under the general authority of 43 CFR 202 is obligated to approve and disapprove wills of deceased Indians disposing of trust property. To this end, he must receive and consider any and all pertinent evidence, including among other things, evidence regarding undue influence.

The provisions for submitting and receiving evidence in Indian probate proceedings are set forth

in 43 CFR 4.232(a) which provides:

Parties in interest may offer at a hearing such relevant evidence as they deem appropriate under the generally accepted rules of evidence of the State in which the evidence is taken, subject to the Administrative Law Judge's supervision as to the extent and manner of presentation of such evidence.

Evidence regarding contested wills are governed by the same provisions except for the provision of 43 CFR 4.233(c) which requires the taking of testimony of subscribing witnesses regarding the execution of the will.

No formal pleadings nor the defining of issues is required in trust probate proceedings by existing rules and regulations presently set forth in 43 CFR 4.200 *et seq.* Absence of such requirement in Indian probate matters appears to be necessary so as not to possibly preclude introduction of evidence that may prove of major importance in the final determination made by an Administrative Law Judge.

Moreover, the appellant's further contention that the Judge's application of the law regarding presumption and burden of proof on undue influence was not in accord with Idaho law is without merit.

[1] The Department has long adhered to the rule that state laws have no application in Indian trust probate proceedings involving wills. *Estate of Ke-to-sah Jefferson*, IA-19 (May 14, 1950); *Estate of Annie Devereaux Howard*, IA-884 (December 17, 1959); *Estates of Laverne Wagon*, A-24459 (Decem-

ber 17, 1946) (June 4, 1948) and (September 21, 1948).

[2] Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding. *Estate of Mary Ursula Rock Well-known*, 1 IBIA 83, 78 I.D. 179 (1971); Upheld in *Shaw v. Morton*, Civil No. 974 (D. Mont., July 9, 1973).

[3] In cases where conflicting testimony has been presented and received by an Administrative Law Judge and he concludes that undue influence was exerted, his findings and conclusions will not be disturbed if his decision is supported by credible evidence. *Estate of Annie Grace*, 63 I.D. 68 (1956); *Estate of Richard Wolf*, IA-490 (September 6, 1955).

In the case at bar, the Administrative Law Judge, having heard the testimony and having observed the witnesses, properly concluded that undue influence had been exerted on the decedent.

We are not in agreement with the appellant's contention that the primary issue in the proceedings was incompetency of the decedent and that the appellee failed to carry the burden of proving incompetency. The record indicates that the decedent at the time the will was executed was 94 years of age, blind, unable to walk, semi-bedridden, and unable to read, understand or speak

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the English language. Again as in the case of conflicting testimony regarding undue influence, the Administrative Law Judge, as the trier of facts after having observed the witnesses, must resolve what weight is to be given to the testimony and evidence presented. *Estate of Felicite (Mrs. Matches)*, IA-1441 (July 12, 1966).

The evidence, consisting of some 266 pages of testimony given in behalf of the appellant and appellee with respect to what transpired at the time of the execution of the will and what prompted the making thereof, is in conflict. Considering the record before us, we are unable to say that the decision of the Administrative Law Judge on the issue of undue influence and testamentary capacity is clearly against the weight of the evidence. Accordingly, the Judge's decision is entitled to stand.

The appellant's final contention that the failure of the Administrative Law Judge to advise both appellant and appellee to seek legal counsel constituted prejudicial error is without merit. The record indicates every effort was made to accommodate the appellant in the proceeding. The Judge, in fact, continued the hearing to a later date and advised appellant to seek legal counsel. The record does not indicate any prejudicial action taken against appellant during the proceedings in the way of limiting her to the number of witnesses she could

present or denying her the right to cross-examine.

The Board having reviewed and considered the record as presently constituted finds that the decision of the Administrative Law Judge entered under date of July 6, 1973, denying Virginia Miller's petition for rehearing should be affirmed and the appeal dismissed.

[4] The Board further finds that the motion of Virginia Miller, the appellant herein, for allowance and payment of attorney's fees in the amount \$500 to Norman L. Gissel for services rendered her in this appeal is an improper and inappropriate claim to be assessed or taxed as costs of the administration of the estate. Accordingly, the motion must be denied.

The Board further finds the motion of Arthur Moore, Sr., for allowance and payment of attorney's fees in the amount of \$500 to Frank V. Barton for services rendered him in connection with this appeal should be allowed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge dated July 6, 1973, denying Virginia Miller's petition to rehear, be, and the same is hereby **AFFIRMED** and the appeal herein is **DISMISSED**.

The claim of Norman L. Gissel for attorney's fees in the amount of \$500 for services rendered in con-

nection with this appeal is hereby **DENIED**.

The claim of Frank V. Barton for attorney's fees in the amount of \$500 for services rendered to Arthur Moore, Sr., in connection with this appeal is hereby **ALLOWED** and said amount shall be paid for funds in the decedent's estate.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

KINGS STATION COAL CORPORATION

3 IBMA 322

Decided September 19, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by an Administrative Law Judge (Docket No. VINC 73-206), dated January 30, 1974, vacating an imminent danger Order of Withdrawal in a proceeding brought pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

In a section 105(a) proceeding concerning a section 104(a) Order of Withdrawal, where the operator establishes by

a preponderance of the evidence that imminent danger did not exist, the Order is properly vacated.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and I. Avrum Fingeret, Esq., Trial Attorney for appellant, Mining Enforcement and Safety Administration; Vilma L. Kohn, Esq., and G. Christopher Meyer, Esq., for appellee, Kings Station Coal Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The factual and procedural background of this case is adequately set forth in the Administrative Law Judge's (Judge) decision dated January 30, 1974.²

[1] This Board believes that its decision in *Quarto Mining Company and Nacco Mining Company*, 3 IBMA 199, 81 I.D. 328, CCH Employment Safety and Health Guide par. 18,075 (1974) is applicable to the instant case. As in the above-cited case, the record in this case reveals "nothing that would tend to establish the probability of imminent danger. As a matter of fact, all of the surrounding circumstances would support at the most a bare possibility that such a condition could exist."³ Kings Station Coal Corporation (Kings Station) rebutted this "bare possibility" at the

¹P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

²The Judge's decision below 3 IBMA 325 follows at 81 I.D. 563.

³*Quarto and Nacco, supra*, at 200.

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hearing, and we think successfully so. Accordingly, we find, as did the Judge, that Kings Station established by a preponderance of the evidence, that an imminent danger did not exist at the time the Order was issued.

Although we recognize there is some question as to whether the inspector followed instructions contained in the MESA Inspection Manual in issuing the Order, our conclusion that the record clearly fails to support a conclusion of imminent danger obviates the need to discuss this question.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

January 30, 1974

3 IBMA 325

DECISION

Application for Review of an Order of Withdrawal

This is a review proceeding under section 104(a) of the Federal Coal

Mine Health and Safety Act of 1969. The operator, Kings Station Coal Corporation, seeks to have Order of Withdrawal No. 1 JWD, issued December 26, 1972, declared void *ab initio*. The Mining Enforcement and Safety Administration (MESA) and the United Mine Workers of America (UMWA) have filed answers in opposition to the application for review.

On June 6, 1973, MESA was ordered to show cause why a summary decision favoring the operator should not be issued. A copy of the order was sent to the operator and UMWA. MESA replied on June 14, 1973, that "The Bureau does not have to come forth with evidence until the Applicant established a prima facie case that there was no imminent danger." A summary decision favoring the operator was issued on November 5, 1973. By decision issued November 5, 1973, the Board of Mine Operations Appeals reversed the summary decision and remanded the matter for hearing and decision on the merits.

After due notice to the parties a hearing on this matter was held in St. Louis, Missouri, on December 14, 1973. MESA was represented by Avrum I. Fingeret, Esquire. Vilma L. Kohn, Esquire, represented the operator. UMWA did not make an appearance.

The Issue

The issue is whether or not an imminent danger existed at the time the Order of Withdrawal No. 1 JWD was issued by Inspector Dan-

iels on December 26, 1972. If an imminent danger did exist the Order of Withdrawal must be affirmed. If it is found that an imminent danger did not exist, the Order is to be vacated.

Pertinent Law, Regulations and Instructions

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

30 U.S.C. § 814(a); Section 104 (a) of the Act.

"(I)mminent danger" means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

30 U.S.C. § 802(j); Section 3(j) of the Act.

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

30 CFR 75.606.

—Unprotected cables that are run over by any type of mobile equipment would be in noncompliance with this section and would warrant the issuance of a 104(a) Order of Withdrawal.

Section 75.606 of Coal Mine Safety Inspection Manual, September 1972.

Summary of Evidence

Inspector James W. Daniels issued the Order of Withdrawal in question at 11:45 a.m., December 26, 1972, due to the following condition:

No. 6 shuttle car right rear wheel was on No. 4 shuttle car trailing cable, 75.606 protection of trailing cables. No. 6 and No. 4 shuttle cars are operating in the second south main east.

The operator was ordered to withdraw employees from the area of the mine described as "No. 6 shuttle car and No. 4 shuttle car." The order was terminated at 12:01 p.m. the same day. The action taken to abate the condition described as follows:

No. 4 shuttle car trailing cable was removed from under the wheel of No. 6 shuttle car and checked by the repair man.

Mr. Everet Messel, Safety Coordinator for the applicant, testified that he accompanied Inspector Daniels on the inspection of December 26, 1972. He did not dispute the facts set out in the order. He testified that had the wheel of the No. 6 shuttle car damaged the trailing cable, then the circuit breaker would have immediately deenergized the cable without endangering persons in the vicinity. Mr. Messel testified that ventilation was adequate at the time the Order was issued and that there was no methane present. He further testified that methane is liberated primarily in the face area, and not in the area where the affected shuttle cars were situated. According to Mr. Messel, the cable

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was in good condition prior to the issuance of the Order, and the inspection of the cable after removal of the shuttle car wheel disclosed no observable damage. In the opinion of Mr. Messel, the wheel parked on the trailing cable presented no danger to mine employees. The absence of methane in the area, the adequate ventilation, and other conditions precluded any danger to mine employees because of the rubber tired wheel of the No. 6 shuttle car being parked on the energized trailing cable of the No. 4 shuttle car.

Inspector Daniels testified that he had worked in the coal mining industry for more than thirty years, and that he had served as an inspector for 2½ years. Inspector Daniels testified that when he saw the wheel of the No. 6 shuttle car parked on the trailing cable of No. 4 shuttle car he immediately informed Mr. Messel that he would issue a section 104(a) Order. Inspector Daniels testified that he expected the cable to be ruptured. He testified, however, that a trailing cable would rupture under these circumstances possibly one out of ten times. Inspector Daniels conceded that there was no significant methane present in the area at the time the Order was issued. However, he pointed out that a Notice had been issued earlier on the same day for a ventilation failure. The ventilation failure had been corrected prior to the issuance of the Order in question.

Inspector Daniels testified that in his opinion mine employees were in an imminent danger because of the wheel being parked on the trailing cable. Had the cable ruptured, he testified, wires might have been bared and a short circuit could have resulted. Had methane been present then it might have been ignited. Or, Inspector Daniels continued, the cable could have ruptured, wires could have been bared and short circuited, and the circuit breaker might have malfunctioned. This set of facts might have produced a fire. A third alternative, Inspector Daniels, testified, was that the cable could have ruptured, wires could have been bared, and a mine employee could have come in contact with the bare wires.

Under questioning from the bench, Inspector Daniels insisted that he did not follow, and in fact ignored, instructions contained in the Coal Mine Safety Inspection Manual for Underground Mines. Despite his many years of experience in the mining industry, Inspector Daniels was unable to recall a single instance of someone being killed or injured because a trailing cable was run over by mobile equipment. He further stated that although he had seen cables run over by mobile equipment over the years, he had never seen a bare wire in a trailing cable while serving as inspector. Despite his experience, however, Inspector Daniels insisted that he expects a cable to rupture and to expose wires whenever it is run over by mobile equipment.

Discussion

The extraction of coal from underground mines is an inherently dangerous occupation. In order to reduce the deaths and injuries in this industry to an absolute minimum, the Federal Coal Mine Health and Safety Act of 1969 was enacted. The Act contains numerous safety standards to achieve this end, and the means of bringing about compliance with the safety standards are well defined.

In addition, the Act contains a humanitarian provision which calls for a mine, or a portion thereof, to be closed whenever mine employees are confronted with an imminent danger. Under section 104(a) of the Act, an inspector may issue an order of withdrawal whenever he reasonably expects a condition or practice to cause death or injury before the condition or practice can be abated. The peremptory power to close down a mine, or a portion thereof, is indeed an awesome power which limits the rights of an operator. Nevertheless, the exigencies of an imminent danger justify the issuance of such an order. The value of life and limb far outweighs any economic loss an operator may suffer because of lawfully issued section 104(a) Orders.

It is evident in the instant case that section 104(a) Orders are sometimes issued because of violations of mandatory standards rather than for the existence of an imminent danger. Section 75.606 of the Inspector's Manual calls for the issuance of a section 104(a) Order

whenever an unprotected training cable is run over by mobile equipment. There is no requirement that an inspector consider the element of imminent danger in this circumstance. In the case at hand, Inspector Daniels testified under oath that he ignored any instructions to issue section 104(a) Orders. It is significant that Inspector Daniels, who has worked in the coal mines for 30 years, was unable to recite a single instance of death or injury resulting from mobile equipment running over a trailing cable. If Inspector Daniels was not influenced by the instructions contained in the manual, then the question arises as to what he based his judgment on in issuing the order.

In order for mine employees to have been placed in the position of imminent danger under facts adduced in this case, several unrelated and untoward events would have had to occur simultaneously or in rapid sequence. Inspector Daniels testified that he expected death or injury to result from the rubber-tired wheel being parked on the energized trailing cable, because the circumstances could result in fire, a methane ignition, or electrocution. These dangers will be considered separately.

1. Death or injury by fire: In order for the condition cited to cause a fire, the trailing cable would have to be ruptured. Inspector Daniels testified under oath that this would occur possibly one out of ten times. In addition, he testified that during 2½ years of work as an inspector, he has not seen one bare wire in a trailing cable. Despite this he testified under oath that he expected the cable to

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rupture. If the cable had ruptured then two wires in the cable would have had to be bared, with a resulting short circuit. And, last but not least, the circuit breaker would have had to malfunction and permit the short circuit to build up sufficient heat to ignite the surrounding combustible materials.

2. Death or injury by methane ignition: In order for methane gas to ignite there must first be methane gas. Inspector Daniels was well aware that there was no methane gas present at the time he issued the order in question. Inspector Daniels testimony that he feared an ignition lacks credibility.

3. Death or injury by electrocution: Inspector Daniels testified under oath that he has never seen a bare wire in a trailing cable during his 2½ years as an inspector. Nevertheless, he fully expected the trailing cable in the instant case to be ruptured, and he expected that a wire in the cable would be bared of insulation. He then expected a mine employee to come in contact with the bare wire and to be electrocuted.

The evidence produced at the hearing in this matter proved without question that an imminent danger did not exist at the time Inspector Daniels issued the order in question. It appears that MESA has instructed Inspectors to issue section 104(a) Orders in order to bring about better compliance with mandatory safety standards contained in the Act. The motive of MESA may not be questioned. The means go beyond the law. An operator may be expected to respond with alacrity to abate any violation when faced with the prospect of a closure order. This section 104(a) Order has a far more immediate impact on an operator than a Notice of Violation and

the consequent prospects of paying a penalty at some date in the future. The fact remains that section 104 (a) Orders may not be issued for the purpose of enforcing mandatory safety standards. It must be remembered that Star-Chamber proceedings during the reign of Henry VIII were extremely efficient, but quite unpopular. The Federal Coal Mine Health and Safety Act of 1969 contains adequate measures for bringing about compliance with mandatory safety standards. Section 104(a) Orders shall not be issued for compliance purposes.

An imminent danger did not exist at the time Inspector Daniels issued Order of Withdrawal 1 JWD on December 26, 1972, and the Order is therefore VACATED.

GEORGE H. PAINTER,

Administrative Law Judge.

EASTERN ASSOCIATED COAL CORP.

3 IBMA 331

Decided September 20, 1974

Appeal by Eastern Associated Coal Corporation from a decision by an Administrative Law Judge upholding the validity of a section 104(c)(2) withdrawal order and dismissing an Application for Review in Docket No. HOPE 73-601.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Hearings: Order of Proof

The Interior Board of Mine Operations Appeals will not overturn a procedural

ruling by an Administrative Law Judge assigning the burden of going forward with respect to a particular issue unless the record manifests an abuse of discretion by showing such ruling to have a clear prejudicial effect upon the objecting party.

2. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Where an Administrative Law Judge has applied the correct legal test and his findings of fact are supported by substantial evidence together with reasonable conclusions regarding the credibility of witnesses, the Interior Board of Mine Operations Appeals will not exercise its *de novo* review powers and will affirm the decision below.

3. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Similarity of Violations

The phrase in section 104(c)(2) of the Act which reads, " * * * violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) * * *," does not mean that all the violations which underlie a section 104(c)(2) closure order must be of the same substantive nature as the violation cited in such order. 30 U.S.C. § 814(c)(2).

4. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Similarity of Violations

By the use of the word "similar" in the phrase of section 104(c)(2) of the Act which reads, " * * * violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) * * *," Congress intended that all the violations necessarily involved in a section 104(c) sequence resulting in the issuance of a section 104(c)(2) closure order must have in common the characteristics enumerated in section 104(c)(1). These common characteristics are that the violation: (1) must not cause imminent danger; (2) must be of such nature

as to significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (3) must be caused by an unwarrantable failure of an operator to comply with a mandatory health or safety standard. 30 U.S.C. § 814(c)(2).

5. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Gravity Requirement

An inspector is justified under section 104(c) of the Act, in finding that a violation " * * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death. 30 U.S.C. § 814(c).

6. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Generally

An inspector is justified in finding an "unwarrantable failure to comply" with a mandatory health or safety standard, pursuant to section 104(c) of the Act, where the evidence shows that the operator *intentionally or knowingly* failed to abate a violation or demonstrated a *reckless disregard* for the health and safety of the miners. 30 U.S.C. § 814(c).

7. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Closure Orders: Inspections

Upon issuance of a valid section 104(c)(2) closure order, an operator becomes subject to further such orders until a *complete* inspection of the mine discloses no "similar" violations. A *spot* inspection which discloses no "similar" violation is insufficient, by itself, to lift continuing liability to closure. 30 U.S.C. § 814(c)(2).

APPEARANCES: Thomas E. Boettger, Esq., for appellant, Eastern Associated Coal Corporation; J. Philip Smith,

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Esq., Assistant Solicitor, Michael J. Heenan, Esq., Trial Attorney for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This case presents to the Board novel procedural and substantive questions of considerable importance in the administration of the Federal Coal Mine Health and Safety Act of 1969 (the Act).¹ Eastern Associated Coal Corporation, hereinafter referred to as Eastern, appeals to the Board, seeking reversal of a decision by an Administrative Law Judge dismissing its Application for Review in Docket No. HOPE 73-601 and upholding the validity of an unwarrantable failure withdrawal order issued pursuant to section 104(c)(2) of the Act.² For the reasons set forth in detail below, we affirm the order of dismissal.

I.

Factual and Procedural Background

On September 5, 1972, a federal coal mine inspector issued a section 104(c)(1) notice of violation at Eastern's Keystone No. 1 Mine, charging the operator with a viola-

tion of the Secretary's roof control regulation. 30 CFR 75.200. Subsequently, on November 3, 1972, a section 104(c)(1) order of withdrawal was issued alleging a violation of 30 CFR 75.400 which proscribes "accumulations" of combustible materials. Within days, on November 10, 1972, another section 104(c)(1) closure order was served on Eastern, this time citing 30 CFR 75.301 which deals with ventilation requirements.

Nearly three months after the issuance of the November 10 order, on February 7, 1973, during a new cycle of spot inspections, Federal Inspector Lawrence C. Snyder, Jr., issued Order of Withdrawal 1 LCS pursuant to section 104(c)(2) of the Act. The order cited 30 CFR 75.200 and charged that Eastern was not following the approved roof control plan in that it had not installed a sufficient number of posts in two parallel rooms to limit the roadway width to 16 feet, from the entrance of the split for at least one full pillar outby the Nos. 4 and 5 entries in the White Oak Section where retreat mining was in progress. (Govt. Ex. No. 4.)

On March 5, 1973, Eastern filed an Application for Review of the February 7 closure order in the Hearings Division pursuant to section 105(a) of the Act. By way of response, MESA and the United Mine Workers of America filed Answers in opposition. A hearing on the merits was held by the Administrative Law Judge on July 18 and 19, 1973, and the decision and order

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² 30 U.S.C. § 814(c)(2).

of dismissal were handed down on September 5, 1973.

Following the issuance of the decision below, Eastern filed a timely Notice of Appeal on September 24, 1973. After receipt of all the briefs, the Board ordered oral argument which took place on March 20, 1974.

II.

Issues on Appeal

A. Whether the Judge erroneously ruled that, in a proceeding to review a section 104(c)(2) closure order, the operator has the burden of going forward with respect to all elements other than the fact of violation.

B. Whether the Judge erroneously ruled that, in a proceeding to review a section 104(c)(2) closure order, the operator has the burden of proof with respect to all elements other than the fact of violation.

C. Whether the Judge correctly concluded that the condition cited in Order of Withdrawal 1 LCS constituted a violation of section 302(a) of the Act.

D. Whether the Judge erred in interpreting the term "similar" in section 104(c)(2) of the Act to mean "unwarrantable failure" and holding that the violation cited in Order of Withdrawal 1 LCS is "similar" to those which gave rise to the underlying section 104(c)(1) notice and orders, respectively.

E. Whether the Judge correctly interpreted the phrase "an inspection of such mine" in section 104(c)(2) of the Act to mean a "complete

inspection" as distinguished from a "spot inspection."

III.

Discussion

A.

The Judge ruled that the burden of going forward with respect to all elements of a section 104(c)(2) charge, except the fact of violation, was placed upon the operator by 43 CFR 4.587.³ He further ruled that the same regulation compelled MESA to bear the burden of proceeding with respect to the proof of violation. In fact, MESA voluntarily went forward with its entire case prior to Eastern's evidentiary presentation. Eastern contends in substance that the Judge's assignment of the burden of going forward was in error and that its right to a fair hearing was prejudiced thereby.

[1] In *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, CCH Employment Safety and Health Guide par. 16,567 (1973), we held that section 7 of the Administrative Procedure Act, 5 U.S.C. § 556(c)(5), and 43 CFR

³ Section 4.587 of 43 CFR provides as follows:

"In proceedings brought under the Act, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence provided that (a) in a penalty proceeding the Bureau shall have the burden of proving its case by a preponderance of the evidence, and (b) wherever the violation of a mandatory health and safety standard is an issue the Mining Enforcement and Safety Administrator shall have the burden of proving the violation by a preponderance of the evidence."

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4.582(a)(5) grant wide latitude and substantial discretion to Administrative Law Judges to determine the manner in which a hearing proceeds, including the assignment of the burden of going forward. We stated that the Board would not overturn a procedural ruling on the order of proof and remand for a new hearing unless the record revealed a manifest abuse of discretion with a clear prejudicial effect upon the party who objects. We reaffirm these prior conclusions and hold them to be dispositive of this question.

Applying the foregoing, we conclude that Eastern's hearing right was not prejudiced by the Judge's assignment of the burden of going forward. While we agree that the Judge erroneously relied on 43 CFR 4.587, inasmuch as it applies only to the burden of proof, that mistaken choice of authority does not amount to reversible error. The soundness of the result that he reached turns solely upon the effect that his ruling had upon the conduct of the hearing. Since, as the record reveals, MESA chose to put on its case in chief with respect to all the elements necessary to sustain the validity of a section 104(c)(2) closure order before Eastern put on its rebuttal, it is obvious that the Judge's statement of what he thought the law to be had no perceptible impact on the fairness of the hearing and amounted to dictum. Therefore, we conclude that Eastern's allegation of error with respect to the burden of going for-

ward is without merit and does not warrant reversal and remand for a new hearing.

B.

In addition to the ruling on the order of proof, Eastern also challenges the Judge's procedural determination regarding the burden of proof. Properly citing 43 CFR 4.587 as the governing regulatory authority, the Judge ruled that, in a proceeding to review a section 104(c)(2) withdrawal order, MESA must prove the existence of the violation, which is the basis of the charge, by a preponderance of the evidence, while the operator must preponderate with respect to all other elements. In his decision, he noted that even if his conclusions on the burden of proof, insofar as Eastern was concerned, were incorrect, his determination to uphold the validity of the closure order would remain the same since MESA had nevertheless preponderated on all elements of the charge.

Eastern urges us to reverse the Judge upon the theory that he erroneously construed and applied 43 CFR 4.587. Alternatively, Eastern contends that assuming *arguendo* that the Judge correctly followed the provisions of that regulation, the regulation itself is invalid under 5 U.S.C. § 556(d).

The question as to which party bears the burden of proof under 43 CFR 4.587 arises only in cases where *neither* party preponderates with respect to a particular element

or elements of a charge. This is not such a case. Clearly the record before us does not present the question that Eastern asks us to decide because the Judge concluded, and we agree, that MESA preponderated as to all the elements that he deemed crucial to the validity of the closure order before him. In addition, we also observe that it would be a truly exceptional case that would come to us so finely balanced as a matter of evidence, that the record would squarely present the burden of proof issue.

In view of our holding that the burden of proof issue is not presented by the record, we need not concern ourselves with Eastern's second contention regarding the validity of 43 CFR 4.587.

C.

We turn now to Eastern's substantive attacks upon the order of dismissal and deal first with its contention that the Judge incorrectly concluded that a violation had taken place. The condition cited in the closure order now before us reads as follows:

The approved roof control plan was not being followed, in that one row of posts were not installed on either side of the roadway to limit the width of roadways to 16 feet from the entrance of the split for at least one full pillar outby the No. 4 and 5 entry in the White Oak Section. (Govt. Ex. No. 4.)

This condition was allegedly in violation of section 302(a) of the Act. 30 U.S.C. § 862(a), 30 CFR 75.200.

On appeal, Eastern challenges the Judge's findings on the question of the existence of a violation in several respects. It is argued that MESA's failure to introduce the actual roof control plan was "* * * fatal to its ability to carry its burden of proof." (Br. of Eastern, p. 15.) Furthermore, Eastern insists that the Judge erroneously determined that timbers were required in the entries in question.

These factual claims were raised before the Judge and he explicitly dealt with them in his decision which contains a detailed and thorough analysis of the record documented by numerous citations to the evidence. (Dec. 11-13.) At pages 13 and 14 of his opinion, the Judge made the following findings:

There is no dispute with respect to the testimony of Mr. Snyder regarding the absence in entries No. 4 and 5 of timbers for one full pillar outby the pillar where retreat mining was being done. Mr. Snyder's testimony that the operator's roof control plan required such timbers also is uncontradicted. Where the inspector's testimony with respect to the requirements of the plan is uncontradicted, it is not necessary for MESA to introduce a copy of the plan.² The Order of Withdrawal cites a violation with respect to both entries No. 4 and 5 and Mr. Snyder testified that there were shuttle car tracks in both entries and that as far as he was concerned when he issued the order both entries were being used as active roadways. The presence of shuttle car tracks in both roadways and the fact that entry No. 4 outby the crosscut was not timbered off supports Mr. Snyder's finding of a violation with respect to both entries. The fact that the shuttle car tracks may have been in entry No. 4 for some time is not sufficient to rebut the prima facie showing of the fact of viola-

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tion made by Mr. Snyder's testimony. The operator did not introduce any evidence or testimony at the hearing which would have shown that entry No. 4 was not being used to transport coal. The only evidence with respect to this is Mr. Snyder's statement that after the withdrawal order was issued the foreman told him that the crosscut between entries No. 4 and 5 was being used as the active roadway. The foreman's after-the-fact representation is not sufficient to challenge the judgment of Mr. Snyder which as already noted, was based upon the presence of tracks in entry No. 4 and the fact that entry No. 4 was not timbered off. Moreover, even if the crosscut had been used as the active roadway, a violation still would have existed because Mr. Snyder's uncontradicted testimony was that the crosscut then would have had the next full pillar outby and should therefore have been timbered in accordance with the roof plan. Mr. Snyder's testimony that the crosscut was not so timbered and that in fact posts were missing in the crosscut is undisputed. In the opinion of this Administrative Law Judge the description of the conditions set forth in the order of withdrawal properly cites a violation with respect to the absence of timbering in the crosscut if in fact the crosscut was used as the active roadway. Finally, there is no dispute that retreat mining had begun in entry No. 5 in that a cut had been made in the inby pillar in that entry. Therefore, timbering was required at the first outby pillar in entry No. 5. The lack of timbering in Entry No. 4 standing alone would constitute a violation and support the issuance of the subject order. In light of the evidence this Administrative Law Judge finds that the conditions cited in the order of withdrawal occurred as set forth therein and concludes that these conditions constituted a violation of the mandatory standards. (Footnote omitted.)

[2] It is the opinion of the Board that the Judge's findings of fact

were based upon substantial evidence and reasonable determinations of credibility. As we have indicated in our prior cases, where a party challenges findings of fact below especially involving credibility, and shows no compelling reason to set them aside, we will not exercise our *de novo* review powers. We are not disposed to encourage parties to relitigate on appeal factual issues reasonably resolved by the primary trier of fact. See, e.g., *Armco Steel Corporation*, 2 IBMA 359, 80 I.D. 790, CCH Employment Safety and Health Guide par. 17,043 (1973) and *Eastern Associated Coal Corporation*, 3 IBMA 208, 81 I.D. 333, CCH Employment Safety and Health Guide par. 18,076 (1974). Accordingly, we affirm the Judge's conclusion that Eastern violated the roof control provision of the Act.

D.

In addition to challenging the finding of violation, Eastern also argues the invalidity of the subject withdrawal order on the ground that the condition cited therein was not substantively similar to the violations which gave rise to the underlying notice and orders, as allegedly required by the Act. The Judge ruled that section 104(c) (2) imposes no requirement of substantive similarity and concluded that the subject closure order was not invalid because two of the underlying violations involved different health and safety standards, namely, ventilation and dust accumulation.

Section 104(c) of the Act reads in its entirety as follows:

(c) (1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of *violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1)* of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph

(1) of this subsection shall again be applicable to that mine. (*Italics added.*)

The resolution of this phase of Eastern's appeal turns on whether the Judge correctly construed the emphasized phrase—" * * * violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) * * *." While we must stay within the confines of the actual language of the Act, we acknowledge that it is something less than self-defining. Accordingly, we have decided, in addition to the literal language, to be guided by our understanding of the precise purposes of the 104(c) sanctions relative to the other sanctions provided to the Secretary elsewhere in sections 104 and 109. In doing so, we must strive to formulate an interpretation which is both practical and fair and which avoids senseless results inconsistent with the purposes of section 104(c).

We believe that section 104 as a whole was designed and intended to provide the Secretary with a range of sharper enforcement tools than previously existed, to deal with various classes of health or safety hazards. The first three subsections of section 104 are concerned with each of these distinct classes.

Subsection (a), which authorizes the issuance of a closure order upon a finding of imminent danger was clearly intended to deal with hazards posing a serious threat of bodily harm or death where the evidence shows that the feared accident or disaster " * * * could reasonably be expected to cause death or serious

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physical harm before such condition or practice could be abated." 30 U.S.C. § 802(j). Moreover, subsection (a) authorizes broad discretion in issuing such orders for the protection of the miners; it neither restricts the issuance of such closure orders to violations of mandatory standards, *Freeman Coal Mining Corporation, supra*, nor makes the validity of such orders dependent upon proof of fault.

Subsection (b) directs the issuance of a notice of violation for alleged infractions of the mandatory health or safety standards, irrespective of seriousness, in situations where the condition or practice cited does not constitute imminent danger. It also authorizes closure orders in cases where an operator fails to abate within the period of time set forth in the underlying notice of violation. Violations cited pursuant to this statutory mandate need not display any particular degree of fault; although if fault is proved, that fact must be taken into consideration, among other specifically enumerated factors, in calculating an appropriate monetary penalty pursuant to section 109 of the Act. The degrees of fault which may be considered in assessing a penalty include recklessness, knowledge, or intention, as well as ordinary negligence. See 30 CFR 100.3(d)(3), 39 F.R. 27559 (1974) and *North American Coal Corporation*, 3 IBMA 93, 118-119, 81 I.D. 204, CCH Employment Safety and Health Guide par. 17,658 (1974).

By comparison, conditions or practices subject to subsection 104(c) treatment, that is, notice and then closure and continuing liability to closure, are restricted as befits the serious consequences of employing such strong enforcement tools. Considering its sequential nature, its explicit restriction to infractions of the mandatory standard, and its reference in paragraph (1) requiring the inspector to find *no* imminent danger, we are of the opinion that section 104(c) has within its ambit conditions or practices, constituting violations, which pose a probable risk of serious bodily harm or death short of imminent danger and where there is a degree of fault, greater than ordinary negligence, which may be aggravated by repetition.⁴ Indeed the Congress provided much the same description of the sweep of section 104(c) in its express enumeration of the findings an inspector must make in a 104(c) (1) notice of violation:

If * * * an authorized representative of the Secretary finds that there has been

⁴ We observe that the Department has recently published in the *Federal Register* new regulations governing informal assessment procedures which recognize the distinction between ordinary negligence and greater degrees of fault. 30 CFR 100.1-100.8, 39 F.R. 27558 (1974). Specifically, subsection 100.3 (d)(2) states that "'Ordinary Negligence' means the operator either failed to exercise reasonable care to prevent the violation or failed to exercise reasonable care to correct a violation he knew or should have known existed." By contrast, subsection 100.3(d)(3) reads: "'Gross Negligence' means an operator either caused the condition or practice which occasioned the violation by exercising reckless disregard of mandatory health and safety standards or he recklessly or deliberately failed to correct an unsafe condition or practice he knew or should have known existed."

a violation of any mandatory health or safety standard, and if he also finds that, *while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure * * * to comply * * *, he shall include such finding in any notice given to the operator under this Act * * *.* (Italics added.)

We regard this quotation as the authoritative statement of the basic tests for the validity of any 104(c) citation, in addition to proof of any underlying notice or orders, as the case may require.

Thus, it follows preliminarily from what has been said that the conditions or practices citable under subsection (a) and (c) of section 104 are by definition mutually exclusive. It also seems clear to us that the combination of sections 104(c) and 109, imposing at least the threat of closure, as well as a civil penalty, was uniquely calculated to provide a stronger and more effective deterrent than the combination of sections 104(b) and 109 which Congress apparently deemed to be inadequate to deal with an operator who is recalcitrant in failing to comply with the Act and who is intentionally, knowingly, or recklessly indifferent to the health and safety of its employees; hence, the distinguishing phrase "unwarrantable failure."

[3] Having set forth this general framework for analysis, we turn now to Eastern's specific contention and the validity of the Judge's rul-

ing, noted earlier, that the 104(c) (2) similarity requirement, stated in the statutory phrase "** * * violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) * * **" does not refer to substantive similarity. As we stated at the outset, Eastern has argued throughout proceedings in the Office of Hearings and Appeals that the sole touchstone of the phrase in question is "substantive similarity."

We are of the opinion that the Judge correctly rejected that argument. We have so concluded both because it is obviously inconsistent with the language of the Act and with the general framework of analysis set forth above.

With regard to the former, we find significance in the deliberate use by Congress in section 104(c) (1) of the word "any" in describing the violations subject to the sanction of a closure order and ninety days of liability to further closures. It is very clear that the word "any" was inserted solely to make plain that the (c) (1) closure order could be issued for a violation of a mandatory standard wholly different from the one upon which the underlying (c) (1) notice was based.⁵ We cannot *imply* the term "substantive" into 104(c) (2) when Congress went to such *express* lengths to eliminate such a requirement in

⁵ For example, if a section 104(c) (1) closure order were issued for a roof control violation and the underlying (c) (1) notice had been issued for an electrical violation, the order would not be invalid simply because the notice had concerned a different kind of violation.

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104(c)(1) without some justification. Certainly, Eastern has not pointed to any rationale to support its argument. In addition, since a (c)(2) violation must, according to the phrase under scrutiny, be similar to both the underlying (c)(1) violations, it follows that the violations in a given 104(c) sequence must share common characteristics. If the infractions citable under (c)(1) may be dissimilar to each other substantively, it follows that the list of common characteristics of a sequence need not include violation of the same type of mandatory health or safety standard.

With respect to the general framework of analysis, were we to adopt Eastern's theory, some violations would be subject to 104(c)(2) sanctions and continuing liability, where treatment under 104(b) and 109 is indicated, even though the hazard involved reveals neither unwarrantable failure *nor* any danger of serious bodily harm or death.⁶ In the absence of clear Congressional direction to the contrary, we decline to adopt an interpretation of section 104(c) which might encourage indiscriminate use of the closure order

sanction without any concomitant health or safety benefit. Accordingly, we hold that the Judge was correct in concluding that there is no requirement of substantive similarity in section 104(c)(2).

[4] As we indicated earlier in the general framework of analysis, the validity of a section 104(c)(2) withdrawal order is measured by the four tests expressly set forth at the outset of subsection (c)(1). To repeat those tests, the record must show: (1) that a violation of a mandatory health or safety standard occurred, (2) that there was no imminent danger, (3) that the violation " * * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *," and (4) that the violation was caused " * * * by an unwarrantable failure * * * to comply * * *." In our view, the phrase in section 104(c)(2), which reads " * * * violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) * * *," carries forward those enumerated characteristics from (c)(1) and encompasses them in (c)(2) as if they were fully set forth. We believe Congress chose this phraseology simply as a technique of draftsmanship for the sake of brevity.

Inasmuch as Eastern did not timely challenge the instant underlying citations, and does not deny the violations, we presume their validity as did the Judge in his decision. Since we have already dealt with the first test of the validity

⁶ Where an operator's repeated failures to abate are due to ordinary negligence, rather than unwarrantable failure, the civil penalty provisions of the Act provide for the appropriate deterrent. 30 U.S.C. § 819. Such a record of careless behavior must be considered by the Judge as a factor in "the previous history of violations," and would be grounds for a comparatively larger assessment than might otherwise be indicated. And as we observed earlier, a failure to abate within a reasonable period of time set forth by an inspector in a 104(b) notice of violation may be dealt with by a 104(b) closure order.

of the closure order in dispute and concluded that there was a violation, we turn now to the remaining three criteria and consider them *seriatim*.

In the decision below, the Judge **concluded that the condition did not constitute imminent danger.** (Dec. 14.) He reached that conclusion on the basis of the issuing inspector's testimony to the effect that although the miners were endangered by the lack of required roof supports, the likelihood of roof fall was not great right at the moment the closure order was issued. (Dec. 11-12) We are of the view that his determination was based upon a reasonable evaluation of the credible evidence and we perceive no basis for overturning his finding of no imminent danger.

[5] With regard to the third test, that is, whether the instant violation was * * * of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * * Eastern submits that the deviation from the approval roof control plan was "technical" and, therefore, not subject to a 104(c) (2) closure order. The inspector testified that the lack of sufficient timber posts constituted a significant hazard because the company had a history of rock fall problems in the White Oak Section. (Tr. 33-34.) The Judge deemed that testimony to be credible (Dec. 14) and Eastern has shown no compelling reason to persuade us to conclude otherwise. On the basis of that testimony and the findings quoted above in Part C,

we find that a reasonable man, given an inspector's qualifications, would conclude that the instant violation posed a probable risk of serious bodily harm or death in the form of a roof collapse.⁷ Accordingly, we hold that the closure order in issue meets the gravity requirements of the third test.

[6] Lastly, with respect to the unwarrantable failure criterion of validity, Eastern argues in substance that there was no showing of a sufficient degree of fault. Since the Congress deliberately omitted any definition of the phrase "unwarrantable failure to comply," it is apparent that the legislators left the task of investing that concept with meaning to the Secretary and his lawful delegates, to be performed on a case-by-case basis. This is not to say, however, that we are without any guidance as to the degrees of fault that the legislative draftsmen sought to encompass in this term of art. Scanty as it is, the legislative history unmistakably suggests that a given 104(c) violation possesses the requisite degree of fault where, on the basis of the evidentiary record, a reasonable man would conclude that the operator *intentionally*⁸ or *knowingly* failed to comply or demonstrated a *reckless disregard* for the health or safety of

⁷ If we thought that the hazard in question had only a *speculative possibility* of occurring, we would of course conclude otherwise.

⁸ Intentional violations, that is, willful or deliberate infractions, also may be referred by the Secretary to the Justice Department for criminal prosecution pursuant to section 109(b) of the Act. 30 U.S.C. § 819(b) (1970).

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the miners.⁹ In the case now before us, the Judge concluded that the record did show "unwarrantable failure." In his evaluation of the inspector's testimony, he wrote the following at page 15:

* * * Mr. Snyder's testimony that retreat mining had been going on in entry No. 4 for three shifts adequately establishes that the operator knew or should have known for a substantial period of time that timbering was required for the outby pillar in that entry. This Administrative Law Judge is further of the view that the operator should have been continuously aware of the provisions of his own roof control plan and that therefore the absence of the required timbering in both entries No. 4 and 5 constituted unwarrantable failure.

We think that his conclusion was rooted in a reasonable assessment of the evidence of record and conforms to the correct legal definition of "unwarrantable failure," as we have stated it. (Tr. 40.)

In sum, it is the judgment of the Board that the section 104(c) (2) closure order challenged in this proceeding by Eastern satisfies all the criteria of validity and that it is therefore "similar to those" underlying 104(c) citations issued pursu-

ant to section 104(c) (1). Accordingly, we find no basis to overturn the Judge's order of dismissal.

E.

The final substantive question raised on appeal by the briefs is whether the phrase "* * * until such time as *an inspection* of such mine discloses no similar violations * * *" in section 104(c) (2), referring to the conditions prerequisite to the lifting of liability, means a clean *complete* inspection or a clean *spot* inspection.¹⁰ The Judge rejected Eastern's argument in support of the latter alternative and Eastern renews its contention on appeal.

[7] In our opinion, the Judge's position, that the disputed phrase refers only to a complete inspection, is the correct one whether one looks to the precise language of the Act or to the policy result which was reasonably contemplated by the Congress. If the legislators had intended to lift liability upon a clean *spot* inspection subsequent to the issuance of a (c) (2) closure order, we think that they would have used the words "*any inspection*" rather than "*an inspection*" in the phrase quoted above. The language actually employed appears to us to direct a thorough examination of the conditions and practices *throughout*

⁹ Legislative history is a relevant authority only where the statute is patently ambiguous. In pertinent part, the history bearing on the meaning of "unwarrantable failure" appears at page 1080 of *House Comm. on Ed. and Labor, Legislative History Federal Coal Mine Health and Safety Act*, Comm. Print, 91st Congress, 2d Session and reads as follows: "* * * The managers note that an unwarrantable failure of the operator to comply means the failure of an operator to abate a violation he *knew or should have known* existed, or the failure to abate a violation because of a *lack of due diligence*, or because of *indifference* or lack of reasonable care, on the operator's part." (Italics added.)

¹⁰ A "spot inspection" occurs when an inspector inspects only a portion of a mine or a whole mine with respect to one kind of potential violation, for example, roof control. A mine, such as Eastern's Keystone operation, is so large that MESA conducts a three month cycle of spot inspections which it deems collectively to be a "complete inspection."

a mine. Indeed the intensive and quite possibly prolonged scrutiny seems entirely called for in the case of an operator which may have repeatedly demonstrated its indifference to the health or safety of miners and where its record suggests that other equally grave infractions resulting from unwarrantable failures to comply may exist elsewhere in the mine. Accordingly, we find no error in the Judge's ruling on this issue.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the order of dismissal in the above-entitled docket IS AFFIRMED.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

JAMES RICHARDS,
Ex Officio Member of the Board.

APPEALS OF GEORGE A. GRANT,
INC.

IBCA-1000-7-73, IBCA-1005-10-73
and IBCA-1006-10-73

Decided September 24, 1974

Contract No. 14-06-100-7125
Specifications No. 100C-1159
Buried Pipe Drains, Block 16
Columbia Basin Project, Washington
Bureau of Reclamation.

Denied.

1. Contracts: Construction and Operation: Estimated Quantities—Contracts: Performance or Default: Excusable Delays—Rules of Practice: Appeals: Burden of Proof

A contractor's claim for a time extension based upon an overrun of contract quantities is denied where the evidence shows that the overrun involved was well within the range of overruns experienced by the contractor under other drainage construction contracts on the Columbia Basin Project and the contractor failed to show that the overrun in contract quantities actually delayed the completion of the whole contract work.

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Performance or Default: Excusable Delays—Contracts: Construction and Operation: Drawings and Specifications

No basis exists for finding either category of changed conditions where the subsurface data furnished by the Government accurately portrays the subsurface conditions actually encountered by the contractor at the site of the work.

3. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Drawings and Specifications

A changes claim is denied where the appellant contends that the representatives of the contracting officer improperly failed to issue instructions for the removal of unstable foundation material at specified locations and for its replacement with gravel filter material but the evidence indicates that the failure of the Government representatives to issue such instructions was simply a recognition by them that it was within the contrac-

tor's prerogative to determine the methods and equipment to be utilized in performing the contract.

4. Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Substantial Performance—Rules of Practice: Appeals: Burden of Proof

A claim of substantial completion asserted under a contract for the installation of buried agricultural drains is denied where the evidence of record shows that the project would not adequately serve its intended purpose earlier than the date the work was accepted as substantially complete by the Government.

APPEARANCES: George A. Grant, President, George A. Grant, Inc., Richland, Washington, for appellant; William N. Dunlop, Department Counsel, Ephrata, Washington, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

These multiple appeals concern claims for additional compensation and for time extensions and a dispute as to the date of substantial completion. Neither party having requested a hearing, the appeals will be decided on the basis of the written evidence of record.¹

¹ This consists primarily of documents contained in the Appeal File and exhibits attached to the three findings of fact from which the instant appeals were taken. The written record also includes three affidavits submitted by the Government in response to the Order Settling Record, dated November 21, 1973.

Background

The contract² dated August 26, 1971, called for the construction of several miles of buried agricultural drains on the Columbia Basin Project for a total estimated price of \$306,764. With payment for the work performed to be made on a unit price³ basis, the contract was scheduled for completion within 205 calendar days from the date of receipt of the notice to proceed.⁴ Since the notice to proceed was received on September 2, 1971, the completion date so established was March 25, 1972. This was extended 5 calendar days as a result of an Order for Changes and 19 calendar days because of unusually severe weather, making April 18, 1972, the revised date for completion of the contract work. The contracting officer found the contract to be substantially complete on June 19, 1972.⁵ This resulted in liquidated damages being assessed for 62 days of delay at the rate specified in the contract.⁶

The drains called for by the contract were to be constructed in accordance with the requirements of the Specifications No. 100C-1159

² The contract includes the General Provisions set forth in Standard Form 23A (October 1969 Edition).

³ Except for Item 24 for which the contractor bid the lump sum of \$300.

⁴ Appeal File, IBCA-1000-7-73; Item f, the Contract, Par. 15, Commencement, Prosecution, and Completion of Work.

⁵ IBCA-1006-10-73, Supplemental Findings of Fact of September 12, 1973, Exhibit 2. The completed construction was accepted by the Government on July 14, 1972. Affidavit of Harold B. Wilcox of December 7, 1973, 8.

⁶ Note 4, *supra*, Par. 16, Liquidated Damages.

and were to be built across farm lands in Block 16 of the Columbia Basin Project about 10 miles north of Pasco, Washington. Lying southeasterly and downslope from the Potholes Canal (an unlined irrigation canal with a carrying capacity of 600 c.f.s. of water), the lands in this area are semi-arid. As a result of irrigation activities in the vicinity, however, the water table rose and by 1968 water had emerged onto the surface and flowed off in an easterly direction. Under a contract awarded to another bidder, an outlet drain⁷ easterly and downslope from these emerging waters had been constructed to carry off the underground and surface waters. The waters continued to rise and on July 22, 1971, bids were opened for the additional drains covered by the instant contract. These are collector drains built in herringbone patterns to collect the ground water where it emerges downslope from the Potholes Canal and convey such water to the outlet drains previously built under Specifications No. 100C-1036.⁸

Although the notice to proceed was received on September 2, 1971, the contractor did not begin excavation until October 18, 1971.⁹ On

March 10, 1972,¹⁰ the contractor gave written notice to the Government that it was encountering unstable soil conditions which were delaying completion of the contract and increasing the cost of performance. Subsequently, by letter of December 8, 1972,¹¹ the contractor requested the Government to furnish the locations, areas and quantities of additional filter material paid for under the contract in order that it might finalize its requests for additional compensation for work considered to be beyond the scope of the contract. The Government furnished the requested information in its letter of December 19, 1972.¹² Thereafter, by letter of April 19, 1973,¹³ the contractor submitted a breakdown of the additional costs attributed to the unstable subgrade conditions encountered in the amount of \$18,391.85 and requested an extension of time related to such conditions. In a letter dated June 25, 1972,¹⁴ the contractor increased the amount claimed for such conditions to \$23,335.07 and requested a 35 calendar day extension in the time for contract performance because of the

⁷ The outlet drain was built under Specifications No. 100C-1036. The appellant bid upon this work but was not the low bidder and did not receive the award. Wilcox affidavit, note 5, *supra*, 2.

⁸ See Wilcox affidavit, note 5, *supra*, 1-2.

⁹ The approximately six weeks' delay in commencing performance would not disentitle the appellant to extensions of time to which it was otherwise entitled. See *Chas. I. Cunningham Co.*, IBCA-60 (December 6, 1957); 64 I.D. 449, 451-52, 57-2 BCA par. 1541 at 5482-83.

¹⁰ IBCA-1005-10-73. Findings of Fact dated August 8, 1973, Exhibit 1. In especially pertinent part the letter states:

"Reference is made to Clauses 3, 4 and 5 of the General Provisions.

"The unstable soil conditions which we are encountering are delaying the completion of our contract and are causing us to incur additional costs.

¹¹ Findings, note 10, *supra*, Exhibit 3.

¹² *Id.*, Exhibit 4.

¹³ *Id.*, Exhibit 5.

¹⁴ *Id.*, Exhibit 7. The intended date was apparently June 25, 1973.

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additional work required by the unstable subgrade.

Time extension for overrun in contract quantities (IBCA-1000-7-73)

The request for an unspecified¹⁵ time extension predicated upon an overrun in contract quantities over those established in the invitation was made for the first time in the contractor's letter of April 19, 1973.¹⁶ The letter identifies Bid Items 1, 2, 3, 5, 7, and 9 as bid items of major importance which overran the estimated quantities. It also states that when the estimated total amount of work to be performed on the contract is compared to the actual amount of work performed and paid for, the work added to the contract is in excess of \$23,000. In a letter of May 11, 1973,¹⁷ the contractor acknowledges that this figure was in error and that the work added was in excess of \$10,000.

An examination of the material included with the May 11 letter discloses that the difference between

the revised estimated contract amount of \$279,357.50¹⁸ and the amount paid for actual work performed of \$289,471.64 is in the amount of \$10,114.14. This represents an overrun of approximately 3.6 percent.

The question presented is whether the overruns in contract quantities involved in this appeal entitled the appellant to a time extension. At the outset we note that the inclusion in the contract of an "estimated quantities"¹⁹ provision would not preclude the granting of a time extension in a proper case. The appellant has been content to rest its case, however, upon the undisputed fact that the quantities required to perform the contract exceeded the estimated quantities by the amounts stated.

[1] The contract clearly indicates²⁰ that at least some variation

¹⁸ The total estimated contract price at the time of bidding of \$306,764 has been reduced to give effect to the estimated amount of savings resulting from the acceptance of the contractor's cost reduction proposal.

¹⁹ "14. Quantities and Unit Prices

"The quantities stated in the schedule are estimated quantities for comparison of bids, and no claim shall be made against the Government for excess or deficiency therein. Payment at the prices agreed upon will be in full for the completed work and will cover materials, supplies, transportation, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided." (Note 4, *supra*, Item f.)

²⁰ Note 4, *supra*, Item f. The following statement is contained on the face page of the contract:

"Contract Price (Express in words and figures). Estimated to be three hundred six thousand, seven hundred sixty-four and 00/100 dollars (\$306,764.00). See Paragraph 14. Quantities and Unit Prices, of the Special Conditions of the Specifications."

¹⁵ Commenting upon this aspect, Department counsel states:

"It would be difficult to specify any time under this claim as appellant has already assigned his entire delay of 62 days to other causes. *Viz.* 35 days for unstable foundations and 27 days under substantial completion claim. * * *" (Government Brief, 3, n. 1.)

¹⁶ Note 4, *supra*, Item c, Findings of Fact dated June 7, 1973, Exhibit 1. This was some 10 months after the contract was determined to be substantially complete as of June 19, 1972. Supplemental Findings, note 5, *supra*, Exhibit 2.

¹⁷ Findings, note 16, *supra*, Exhibit 4. The letter enclosed a breakdown showing, for each of the items of major importance involved in the overrun, the estimated quantity, the actual quantity and the resulting excess.

in contract quantities was within the contemplation of the parties. The Government has undertaken to show that the overruns in quantities on the instant contract were well within the range of the overruns experienced by the appellant under other drainage construction contracts on the Columbia Basin Project. An examination of a list ²¹ of 16 Bureau of Reclamation contracts awarded to the appellant since 1965 reveals that variation in estimated quantities resulted in overruns in contract earnings exactly 50% of the time and that half of such overruns are in excess of the 3.6% increase in the present case. The Government has also called attention to the absence of any evidence to show that the overrun in contract quantities had prolonged the appellant's operation.²²

We find that the appellant has failed to establish that the variation in contract quantities from those estimated was unforeseeable, beyond its control and without its fault or negligence;²³ nor has it shown that the overrun in contract quantities actually delayed the completion of the whole contract work.²⁴ The appeal is therefore denied.

Claim for Unstable Subgrade
(IBCA-1005-10-73)

The scope and basis for this claim is outlined in the contractor's letter of April 19, 1973,²⁵ a portion of which is quoted below:

After excavating for the buried drains to the lines and subgrades required by the plans and specifications and after installing the filter gravel and pipe for the drain lines on this subgrade, it was found that in some areas the subgrade would not support the filter gravel and pipe.

* * * * *

Your specifications provide for the placing of additional filter gravel where necessary and when so directed, in order to stabilize the subgrade.

In certain areas we were directed to place a specific amount of additional filter gravel to stabilize the subgrade. The additional filter gravel, in many cases, was not adequate to stabilize the subgrade.

In order to complete this project, additional filter gravel was added as necessary to stabilize the subgrade. Your personnel knew that the additional filter gravel was being placed and that by this method the subgrade was stabilized and the project completed. Additional filter gravel was also used to stabilize the subgrade under manholes as necessary.

* * * By your letter of December 19, 1972 you provided us with a breakdown indicating the areas in which you state additional filter material was directed and paid under this contract.

We are enclosing a breakdown of areas in which we added additional filter material and which you did not include in your breakdown of December 18, 1972.

* * * * *

It should be noted that we are not requesting compensation for surface

²¹ See Affidavit of William A. Fraser, Chief, Construction Division of the Columbia Basin Project, dated December 3, 1973, Exhibit A.

²² *Id.* at 2.

²³ *K-P Construction Company, Inc.*, IBCA-989-3-73 (September 28, 1973), 73-2 BCA par. 10,294. *Cf. R & M Contractors, Inc.*, IBCA-325 (April 21, 1964), 71 I.D. 132, 1964 BCA par. 4208.

²⁴ See *M.S.I. Corporation*, VACAB No. 503 (October 29, 1965), 65-2 BCA par. 5203, at 24,455.

²⁵ Note 13, *supra*. Earlier correspondence pertaining to the claim is discussed in the text accompanying notes 10, 11 and 12, *supra*, while a later letter increasing the amount of the claim is cited in note 14.

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water encountered and so indicated on the contract drawings.

The detailed breakdown which accompanied the April 19, 1973 letter listed the areas on the project where additional work had been performed in order to stabilize the subgrade and where filter material (over and above that directed and paid for by the Government) had been placed. Opposite each of the items are listed the date or dates when the work was performed, the station numbers involved and the materials, labor and equipment used, as well as the prices, rates and extensions on which the total claim is based.

The Changed Conditions Claim

In the course of denying the claim the contracting officer quoted various provisions from the specifications (see Appendix). Concerning the eight claim items for additional costs to correct pipe allegedly displaced during pipe-laying or after backfilling operations, the contracting officer concluded that "causes of unacceptable reaches of installed pipe included pulled joints, failure to properly handle subsurface water conditions which permitted entry of silt and sand into the pipe being installed thereby causing plugged conditions, and pipe being laid to an incorrect grade."²⁶ The central finding made by the contracting officer with re-

spect to the changed conditions claim,²⁷ however, is that set forth below:

* * * At no time has the contractor submitted any evidence to show that the subsurface data placed in the specifications were erroneous. The contractor's claim of encountering unstable subgrade conditions does not justify a finding of differing site conditions and thereby entitle the contractor to an extension of time or additional compensation. The existence of unstable reaches in the drain pipe trenches was expected by the Government and portions of Paragraphs 54 and 59 were written to provide for the stabilization thereof. The conditions encountered during construction of the drains at locations cited in the contractor's letter of April 19, 1973 (Exhibit 5) were essentially the same as those indicated in the specifications. Since the subsurface data clearly showed saturated soil conditions with severe caving present and inasmuch as the specifications stated that the contractor constructing a portion of the D16-330 under another contract installed a well-point system²⁸

²⁷ This includes not only the claim items involving the correction of pipe (note 26, *supra*) but also those related to the installation of manholes, *i.e.*, claim items 2, 4, 5, 8, 12, 14, 15 and 16.

²⁸ After referring to the specification requirements for the other contract involving the D16-330 drain (see portion of subparagraph 48a of the Specifications quoted in the Appendix), the appellant states: "We were not furnished a copy of these specifications before bidding or after award of the contract. * * * Was the additional work for subgrade stabilization paid for as an extra? This subparagraph does not provide quantitative data to prepare a unit price bid to include all possible contingencies." (Notice of Appeal, 2).

The appellant presumably had a copy of the specifications in question, however, at the time it bid thereon (note 7, *supra*). In any event it is clear that under subparagraph 48 b and c of the instant contract (see Appendix) the appellant was required to "furnish, install, maintain, and operate all pumping and other equipment, including well points, necessary to

²⁶ Findings, note 10, *supra*, 6. The claim items covered by the findings are: 1, 3, 6, 7, 9, 10, 13 and 17.

in order to stabilize foundation conditions from Station 112+17 to Station 130+25.8, which is the beginning of the drainage system under this contract, it is found, after careful review of all the facts, that the contractor's claim for additional compensation in the amount of \$23,335.07, and an extension of contract time because of claimed differing site conditions encountered in the form of unstable foundations, is without merit and, accordingly, is denied * * *.²⁹

Neither in the Notice of Appeal and Complaint of September 19, 1973, nor elsewhere does the appellant assert that the conditions actually encountered in performing the contract work differed from those indicated by the subsurface data incorporated into the contract. Nowhere does the appellant undertake to contest the accuracy of the contracting officer's findings as to what the applicable logs of exploration showed with respect to claim items 1, 3, 6, 7, 9, 10, 13 and 17.³⁰ Our own review of these items³¹ and

maintain the excavations in good order during construction," and the cost of all such work was to be "included in the prices bid in the schedule for excavation."

²⁹ Findings, note 10, *supra*, § 9.

³⁰ In the aggregate these items comprise approximately 70% of the dollar value of the changed conditions claim. Illustrative of such findings are those made pertaining to claim item 6 ("The log at Station 11+00 shows saturated, severe caving conditions to the drilled depth of 12 feet the log at Station 18+00 shows saturated, severe caving conditions to a depth of 40 feet."), and claim item 7 ("The log at Station 18+00 shows saturated, severe caving conditions to a depth of 40 feet; the log at Station 25+00 shows saturated, severe caving conditions to the bottom of the 7-foot drill hole."). Findings, note 10, *supra*, § 5.

³¹ The logs of exploration involved in such review are shown on Sheets 9, 12, 14, 25 and 30 of the drawings made a part of the specifications and attached to the contract (note 4, *supra*, the Contract, Par. 76 and the listed Plans, Profiles and Logs of Exploration).

those involving the installation of manholes,³² in the light of what is shown by the logs of exploration closest to where the applicable work was performed, confirms the accuracy of the contracting officer's finding that the conditions encountered were essentially as indicated in the specifications.

Insofar as the claim of changed conditions itself is concerned, the appellant advances two principal contentions. First, it is said that the purpose and intent of Article 4 (see Appendix) is to take the gamble out of subsurface work and allow the contractor to bid a fixed price without including a contingency for unknown subsurface difficulties. Second, the inclusion of general disclaimers of liability in the specifications is said to be an attempt to restrict the operation of Article 4, Differing Site Conditions, of the General Provisions. In support of the latter contention the appellant quotes some provisions³³ from the instant contract which are considered to fall into this category.

Very early in the Board's history we had occasion to discuss the nature of the risks included within the coverage of Article 4 (Changed Conditions).³⁴ In *L. D. Shilling Company, Inc.*, IBCA-23 (Supp.) (April 30, 1956), 63 I.D. 105, 117,

³² The logs of exploration in question are shown on Sheets 9, 10, 12, 14, 23 and 31 of the drawings (note 31, *supra*). The contracting officer also referred to and quoted from subparagraphs 59 b and c (see Appendix) as supporting the denial.

³³ Notice of Appeal and Complaint of September 19, 1973, p. 2.

³⁴ Now termed Differing Site Conditions (See Appendix for text).

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the Board stated: "* * * While the Court of Claims has emphasized that one of the purposes of the 'changed conditions' article is to induce contractors to make low bids by eliminating unknown conditions and contingencies,³⁵ it was certainly not intended to encourage prodigal bidding in the face of readily ascertainable conditions."

Neither in the cases cited in *Shilling* nor in more recent cases has the Court of Claims ever suggested that to forestall a claim under the Changed Conditions article, the bidder must be provided with "quantitative data to prepare a unit price bid to include all possible contingencies."³⁶ The conditions the appellant overcame in performing the contract were not materially different from the conditions indicated in the contract as likely to prevail in the areas where they were encountered. From the appellant's standpoint the difficulty is not the presence of disclaimers of liability by the absence of any positive indications³⁷ in the contract that conditions with re-

spect to the subgrade would be different than they turned out to be.

[2] From the changed conditions claim as presented it is not possible to tell whether the appellant is seeking to establish a category one or a category two claim within the meaning of Article 4. It is unnecessary for us to resolve this question or to make separate findings with respect to each category, however, where, as here,³⁸ subsurface data furnished by the Government accurately portrayed the subsurface conditions that were in fact encountered at the site.

We find no material differences between the subsurface conditions at the site and those indicated in the contract specifications and drawings and particularly the logs of exploration. The changed conditions aspect of the claim is therefore denied.³⁹

The Changes Claim

Apparently the appellant also considers the claim to be cognizable as a change⁴⁰ for near the end of the notice of appeal the following statement is made:

5. The findings of fact cites the paragraphs on disclaimer of liability and concludes that the specifications indicate the strong probability of unstable subgrade conditions in certain areas and thereby does not justify a finding of differing site conditions. We are then left

³⁵ Citing *The Arundel Corp. v. United States*, 103 Ct. Cl. 688, 711 (1945), and three other Court of Claims decisions.

³⁶ The quoted language is from a comment made by the appellant upon subparagraph 48a of the Specifications (note 28, *supra*).

³⁷ *Pacific Alaska Contractors, Inc. v. United States*, 193 Ct. Cl. 850, 863-64 (1971) ("* * * insofar as subsurface or latent, conditions are concerned, there must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found in contract performance, or to view the other side of the coin, that there were such indications which induced reasonable reliance by the successful bidder that subsurface conditions would be more favorable than those encountered.") (Citations omitted)

³⁸ Cf. *John M. Kelch, Inc.*, IBCA-830-3-70 (June 22, 1971), 78 I.D. 208, 216.

³⁹ *D. J. McQuestion and Sons v. United States*, 194 Ct. Cl. 522, 529 (1971).

⁴⁰ See Appendix for the text of Clause 3, Changes.

at the mercy of the representatives of the Contracting Officer in directing us to remove the unstable foundation material and replace with graded filter material, whereby we would be paid for the extra work. In some instances we were so directed, but our claim " presents those instances where we should have received directions from the contracting officer or his representative as provided in the specifications * * *. These directions were not issued and the contracting officer's representative relied on the disclaimers * * * to deny our claim for extra work.

Absent from the above-quoted statement is any intimation that during contract performance the appellant requested the contracting officer or his representative to give directions for the removal of foundation material considered to be unstable and for its replacement with graded filter material; nor is there any indication that the appellant protested ⁴² the failure of the con-

⁴¹ The Government asserts that this claim is barred by reason of the appellant's failure to give timely notice as required by the Changes clause (see Appendix). Since we find that the appellant has failed to carry its burden of proof on the merits, we need not determine whether the mere reference to the Changes clause in the appellant's letter of March 2, 1972 (note 10, *supra*), was sufficient notice to the Government of the claim here asserted. *Electrical Enterprises, Inc.*, IBCA-971-8-72 (March 19, 1974), 81 I.D. 114, 121, 74-1 BCA par. 10,528 at 49,866.

⁴² The absence of any protest during contract performance is emphasized by the Bureau's Field Engineer who states: "I was aware that appellant was claiming unstable soil conditions as a basis for a time extension and additional costs (letter of March 2, 1972). However, appellant never in any way informed me or my office that he was also claiming the Government was failing to properly direct the removal of unstable material as the work progressed. Where unstable conditions were evident that would cause unequal settlement, we did direct and within the paylines pay appellant for its removal. I am unaware of any instance where this was not done and appellant otherwise made no objection at the time." (Wilcox affidavit, note 5, *supra*, 5.)

tracting officer or his representative to issue such directions. In the correspondence conducted with the Government prior to the filing of the Notice of Appeal the appellant does not indicate that during contract performance the field personnel had failed to issue directions for the removal and replacement of material involved in the present claim. Thus, in a claim letter ⁴³ written 10 months after the contract had been determined to be substantially complete, the appellant states: "Your field personnel recognized that this additional filter material was being installed and that drain lines were being dug up and relayed and yet you do not mention this additional work or additional filter material in your breakdown. There was no reason to dig up and relay these drain lines, other than the pipe sinking into the unstable subgrade, and we assume your field personnel were cognizant of this fact."

[3] In his affidavit of December 7, 1973, the Bureau of Reclamation's Field Engineer, Harold B. Wilcox, has described in some detail the conditions indicated in the contract specifications, the conditions actually encountered on the job, the construction techniques commonly employed to overcome conditions of instability and the construction method chosen by the appellant to remedy such conditions in areas where they were found to prevail. Mr. Wilcox states that at the time of

⁴³ Letter of April 19, 1973 (note 13, *supra*, 2).

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bid opening on July 22, 1971, parts of the construction area involved in Specifications No. 100C-1159 were covered with tules and cattails with water ponded on the surface; that the soil in Irrigation Block 16 was generally known to be composed of sandy material as was indicated in the contract logs; that the unstable subgrade locations listed in appellant's April 19, 1973 letter occurred in areas where the trench bottoms were dug to considerable depth below the water table with resulting instability; that to control the expected instability of the trench bottoms on drain jobs, the methods⁴⁴ frequently used by contractors on the Columbia Basin Project are wellpoints and extra filter gravel; and that on this job the appellant did not use wellpoints.

Concerning the construction methods employed by the appellant and their relationship to the claim asserted, Mr. Wilcox offers the following assessment:

* * * All excavations for the pipe repairs listed in appellant's April 19, 1973 letter, with the exception of the D16-330Y1, were accomplished by clambucket or backhoe, which because of the water and unstable conditions resulted in wide, sloping trenches. These conditions were not unusual in view of the sandy nature of the soil and the depth of excavation

below the water table. To control sloughing of the sides⁴⁵ and firm up the bottom of the trench, appellant placed filter gravel, sometimes in large amounts. The placement of filter gravel to control instability is a customary construction technique in such a boggy environment and is not at all unusual. * * *

The volume of filter gravel listed in appellant's claim (April 19, 1973 letter) represents gravel placed in wide sloping trenches beyond paylines and on the sides of such trenches. The quantities of filter gravel listed by appellant for such pipe repair and for setting manholes appear normal for this type of drain construction. * * *⁴⁶

The contract itself clearly requires the contractor to be responsible for handling unstable subgrade and for bearing the expenses incurred in connection therewith.⁴⁷ It also specifies that the contractor shall only be paid for work performed within paylines.⁴⁸

We, therefore, find that the failure of the Government's representatives to issue any instructions in the circumstances present here was simply a recognition by them of the contractor's prerogative to determine the methods and equipment to be utilized in performing the contract. This aspect of the claim is also denied.

⁴⁵ See Contractor's Daily Journal for June 15, 1972 (Findings, note 5, *supra*, Exhibit 3) for the following entry: "* * * Banks sliding in lots of water. Trying to hold slope with gravel."

⁴⁶ Wilcox affidavit, note 5, *supra*, 4, 5.

⁴⁷ Paragraphs 48b, 48c and 59c (see Appendix).

⁴⁸ Paragraphs 54c, 59a and 59b (see Appendix).

⁴⁴ * * * Wellpoints are used to draw down the surrounding ground water level. Filter gravel being heavier than the light sands in the trench walls and bottoms, when placed in sufficient quantities, is not floated out by the pressure of the water table, and helps to maintain the trench walls and provides a stable foundation on which to lay the drain pipe. * * * (Wilcox Affidavit, note 5, *supra*, 4.)

Substantial Completion (IBCA—1006-10-73)

This appeal stems from the denial⁴⁹ of appellant's claim that the contract work should have been accepted as substantially complete on May 23, 1972, rather than on June 19, 1972,⁵⁰ the date used by the Government for terminating the assessment of liquidated damages for delayed performance. The parties are apart on both the amount of work performed after May 23, 1972, and its significance.

In its letter of October 12, 1973, the appellant disputes the Government's contention that 2,970 feet of drain line either failed to function because they were plugged or were relaid after May 23, 1972. Asserting that 1,540 feet⁵¹ of drain lines were relaid, it identifies the drain pipe involved in the controversy as consisting of the following:

⁴⁹ Findings, note 5, *supra*.

⁵⁰ Note 5, *supra*, Exhibit 2.

⁵¹ According to the Government only 1,450 feet of drain pipe were relaid. The Government's position is corroborated by the Construction Inspector's Reports (Appeal File, note 4, *supra*, item i) which show the following pipe to have been relaid on the dates shown:

Drain Line	Stations Involved	Feet	Construction Inspector's Reports
D16-330Y1	00 to 4+50	450	May 25, 1972.
D16-330K1L	5+35 to 8+64.9	329.9	June 13-15, 1972.
D16-330X	7+75 to 6+60	115	June 15, 1972.
D16-330X	6+60 to 6+45	15	June 16, 1972.
D16-330K1	46+60 to 52+00	540	June 16, 1972.

1,449.9

a. D16-330K1L—865 feet of 6-inch plastic & concrete drain pipe

b. D16-330X—675 feet of 6-inch plastic & concrete drain pipe

c. D16-330Y1—450 feet of 6-inch plastic drain pipe

d. D16-330K1—980 feet of 6-inch plastic, 8-inch concrete drain pipe.

Thereafter, the appellant states: "The 1540 feet of drain pipe consists of items a and b above. Drain line D16-330Y1 passed the ball test on May 25, 1972 and was functioning as indicated in the Bureau's construction inspector's report, item i of the Appeal File. The contractor is not aware of why 980 feet of drain line D16-330K1 is included in the Government's statement.

"3. The Contractor disagrees with the Government's statement that 'These plugs not only prevented drain out of ground under from upstream agricultural land, but also interfered with the effective lowering of the ground water table under other agricultural lands served by the drain lines downstream from such plugs.' These lines were not plugged. Only a 5-inch diameter ball could not pass through a 6-inch pipe. The lines were open and draining the ground water. An examination of the drawings will show that those two drain lines are continuous to each other and at the end of the construction of the drain line. The only agricultural land affected, would be that adjacent to 1540 feet of drain line. No agricultural land either upstream or downstream was affected by these two drain lines.

* * *

The Bureau's Construction Inspector's reports confirm that drain

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line D16-330Y1 passed the ball test required by the specifications⁵² on May 25, 1972, and was functioning. These same reports,⁵³ show that a decision was made to replace at least some portion of drain line D16-330K1, on June 9, 1972; that work continued on June 12 and June 16, 1972; and that work was not completed on this line until June 19, 1972, the date the contracting officer determined the contract to be substantially complete.

The misapprehension of the appellant concerning the absence of work on the D16-330K1 drain line after May 23, 1972, appears to be largely responsible for the disparity in the views of the parties concerning the quantity of work remaining to be done on that date and its effect upon the project. In his affidavit of December 7, 1973, Field Engineer Wilcox states at pages 6 and 7:

* * * On May 26, 1972, appellant was unsuccessful in ball testing the D16-330K1L-D16-330X line. On May 30, appellant used excavating equipment to dig holes along these drain lines at various places to find defective pipe. On May 31, he dug more holes and found smashed pipe half filled with mud but was unable to find the test balls in the line. On June 7, 1972, he again started uncovering portions of the D16-330K1L-D16-330X line in an attempt to locate the plugs in the line. At about station 5+00, D16-330K1L, the uncovered plastic pipe was found to be flattened and stretched. On June 8

more flattened pipe was found on this line. Meanwhile a section of the D16-330K1 line had been found to be defective and appellant on June 9, 1972 excavated a surface drain to unwater the area, and on June 12 stripped top soil from several hundred feet of this line as a preliminary to pipe replacement. From June 13 to June 15 appellant relaid drain pipe from station 5+35 to 8+64.9 on the D16-330K1L. On June 15 and 16 he also relaid a section of pipe on the D16-330X. On June 16, appellant relaid 540 feet of pipe by trencher on the D16-330K1 line between stations 46+60 and 52+00. On June 19, after again replacing some defective pipe, he backfilled this line (D16-330K1) and successfully ball tested it. At this time, all lines had been installed and successfully ball tested.⁵⁴

My office records indicate approximately 1,450 feet⁵⁵ of drain pipe had to be replaced between May 23 and June 19, 1972 on four lines. Although the lines were carrying water, the defective portions of the lines impeded drainage in upstream pipe. The defective pipe at station 46+60 on the D16-330K1 would impede upstream drainage of 980 feet of pipe to the end of that line at station 56+40. Further, this defective pipe alone would also impede drainage on the entire 865 feet of the D16-330K1L and 675 feet of the D16-330X.

Based upon what is either admitted by the appellant or shown to be the case in the contemporaneous records maintained by the appellant and the Government, and taking into account the assessment made by Field Engineer Wilcox as disclosed above, the Board finds that after

⁵² Appeal File, note 4, *supra*, Item f, the Contract, Paragraph 74(f).

⁵³ Appeal File, note 4, *supra*, Item 1 (6/09/12/16 & 19; 1972). The contractor's Daily Journals for these dates also indicate that work of the type described was proceeding on the D16-330K1 Drain (Findings, note 5, *supra*, Exhibit 3).

⁵⁴ Other evidence of record confirm the accuracy of the statements made by Mr. Wilcox. See Contractor's Daily Journals (Findings, note 5, *supra*, Exhibit 3) and the Construction Inspector's Reports (Appeal File, note 4, *supra*, Item 1) for the dates specified.

⁵⁵ See note 51, *supra*, for a breakdown of the pipe involved.

May 23, 1972, a total of 2,970 feet of drain line failed to function effectively either because the pipelines were plugged or had to be replaced and relaid. This represents 3.35 percent⁵⁶ of the 88,779.6 feet of drain line contained in the contract according to the Notice of Appeal. We find that the amount of work accomplished as of May 23, 1972, is within the range of percentages considered acceptable for invoking the doctrine of substantial completion.⁵⁷

[4] Remaining for consideration is the question of whether in the circumstances of this case it can be said that either on May 23 or on May 25, 1972,⁵⁸ work had progressed to the extent that the project was capable of adequately serving its intended purpose.⁵⁹ The appellant does not contest the Government's statement that "On the Columbia Basin Project, the Government has buried pipe drains constructed to permit agricultural use of the overlying adjacent lands."⁶⁰ It denies the significance of the work performed after May 23, 1972, however, stating:

The contractor's operations after May 23, 1972, were *not* substantial and *did not* interfere with the landowners' farming procedures. * * *⁶¹

⁵⁶ As of May 25, 1972, the contract requirements had been met for 450 additional feet of drain pipe on D16-330Y1. On that date the uncompleted work would amount to 2.84 percent ($2520 \div 88,779.6 = 2.84$ percent).

⁵⁷ *Electrical Enterprises, Inc.*, IBCA-972-9-72 (December 28, 1973), 74-1 BCA par. 10,400, at 49,119.

⁵⁸ Note 56, *supra*.

⁵⁹ *Electrical Enterprises, Inc.*, note 57, *supra*.

⁶⁰ Government's Answer, 3.

⁶¹ Notice of Appeal and Complaint, dated September 19, 1973.

At the outset we note that much of the work performed after May 23, 1972, involved efforts by the contractor and the Government⁶² to locate the source of the difficulties which were precluding the acceptance of the pipe. For example, the failure of the D16-330K1L drain line to pass the ball test on May 26, 1972, resulted in continuing but unsuccessful efforts to locate the ball in the line on May 30 and 31 and on June 1, 2 and 7. The effort was finally abandoned on June 8, 1972, when the 6-inch pipe uncovered was found to have only 4½" clearance on the inside and the decision was made to strip the line and replace. The actual replacement of the pipe on this line occurred on June 13, 14 and 15. The relaid pipe was back-filled on June 16, 1972 and the line was successfully ball tested on June 19, 1972.⁶³

The contemporaneous records maintained by the parties disclose that throughout the period in question the contractor regularly employed various items of heavy equipment in performing the required work (*e.g.*, Lorain dragline, backhoes, D16 Dozer). Moreover, the same records show that of the

⁶² The Contractor's Daily Journal for June 2, 1972 (the June 5, 1972 designation appears to be in error), contains the following notation: "B. Kolterman USBR on Job for 3 Hrs. Looking for Reasons Why Pipe Wouldn't Test * * *." Robert J. Kolterman, Chief, Construction Field Branch, USBR (Mr. Wilcox's supervisor). Affidavit of Fraser, note 21, *supra*, at 3.

⁶³ See Construction Inspector's Reports (Appeal File, note 4, *supra*, Item i) and Contractor's Daily Journals (Findings, note 5, *supra*, Exhibit 3) for the dates specified.

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drain lines successfully tested after May 23, 1972, almost 50 percent.⁶⁴ of the pipe involved had been dug up and relaid. To say in such circumstances that the contractor's operations were not substantial and did not interfere with the landowners' farming procedures would be to ignore the evidence of record. In addition, the record indicates that with respect to 2,520 feet of pipe serious drainage problems existed until 540 feet of pipe was relaid on the D16-330K1 drain line on June 16, 1972 and some bad pipe replaced on this line on June 19, 1972.

We, therefore, find that the project was not capable of adequately serving its intended purpose on May 23, 1972 or on any date thereafter until June 19, 1972, the date the work was accepted as substantially complete by the Government. Accordingly, the appeal is denied.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I CONCUR:

SHERMAN P. KIMBALL,
Administrative Judge.

APPENDIX

General Provisions

3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the

contract, including but not limited to changes:

- (i) In the specifications (including drawings and designs);
- (ii) In the method or manner of performance of the work;
- (iii) In the Government-furnished facilities, equipment, materials, services, or site; or
- (iv) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order;

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however,* That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required * * *

* * * * *

4. DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of:

(1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or

⁶⁴ Of the 2,970 feet of pipe in question, a total of 1,450 feet was replaced and relaid (note 51, *supra*). This represents 48.82 percent (1450 ÷ 2970).

(2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

SPECIFICATIONS

48. *Water Conditions and Handling Water*

a. General.—* * *

The existing D16-330 buried pipe drain, shown on the Location Map on Drawing No. 1 (222-116-37914), was constructed under Specifications No. 100C-1036 during the first half of 1969. The contractor under Specifications No. 100C-1036 installed a well point system from about Station 112+17 to Station 130+25.8 to dewater the drain during construction. Additional work for subgrade stabilization was also required from about Station 100+67 to Station 112+17.

Known ponds and their water surface elevations and marshy or cattail areas are shown on the drawing.

b. Handling water.—Where the excavation to be performed under these specifications crosses or otherwise encounters ponds or pools of water or where excavation is performed in material below the ground water surface or in running water, the Contractor shall provide for controlled drawdown of water during the progress of the work so that no damage will result to either public or private interests. The contractor's method of excavation and handling of excavated materials and method for control of drawdown of the water surfaces, including ground

water surfaces, shall prevent drainout of bank storage at a rate that will cause significant sloughing of the banks. * * *

The Contractor shall construct and maintain all necessary cofferdams, bulkheads, channels, flumes, or other temporary diversion and protective works, shall furnish all materials required therefor; and shall furnish, install, maintain, and operate all pumping and other equipment, including well points, necessary to maintain the excavations in good order during construction. * * *

c. Costs.—The costs of all work required by this paragraph shall be included in the prices bid in the schedule for excavation.

54. *Excavation and Backfill of Drain Pipe Trenches*

c. Excavation.—The trench for a pipe drain shall be excavated to the grades shown on the drawings or established by the Contracting Officer. Where graded gravel filter is required it will be necessary to excavate to an additional depth of approximately 6 inches below the grade shown on the profile drawings to accommodate the thickness of the pipe and the gravel filter.

Where in the opinion of the Contracting Officer, the character of the material in the bottom of a drain pipe trench is such as might cause unequal settlement, the unstable material shall be removed to such depth as may be directed and the additional excavation backfilled with graded gravel filter material.

*** Regardless of the side slopes and the width of the trenches as actually excavated, measurement for payment of the excavation for the pipe trenches will be made to the widths shown on the drawings, with vertical sides, and to the depths shown on the drawings or prescribed by the Contracting Officer.

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* * * Measurement, for payment, for removing unsuitable material and refilling with selected material will be made only for the actual quantities directed to be removed and payment therefor will be made at the unit price bid in the schedule for excavation, common, and backfill of drain pipe trenches. * * *

59. *Excavation for Structures*

a. Measurement for payment.—Excavation for structures will be measured for payment to excavation pay lines shown on the drawings, or if not shown on the drawings to pay lines in accordance with the provisions of this paragraph. * * * Any excavation outside the prescribed pay lines which is performed by the Contractor for safety purposes, or to facilitate his operations shall be at the expense of the Contractor.

* * * * *

b. Foundations for structures.—Excavation for the foundation of structures shall be to the elevations shown on the drawings or established by the Contracting Officer. The Contractor shall prepare the foundations at structures sites by methods which will provide firm foundations for the structures. * * * Measurement and payment for excavation, backfill, and compacting backfill will be made to depths and dimensions directed.

If at any point in common excavation the foundation material is excavated beyond the lines required to receive the structure, the overexcavation shall be filled with suitable materials and compacted in accordance with Paragraph 63. If at any point in common excavation, the natural foundation material is disturbed or loosened during the excavation process or otherwise, it shall be compacted in place or, where directed, it shall be removed and replaced with suitable material and compacted in accordance with Paragraph 63. Any and all excess excavation or overexcavation performed by the Contractor for any purpose or reason except for additional excavation as may be prescribed by the Contracting Officer, and

whether or not due to the fault of the Contractor, shall be at the expense of the Contractor. Fill and compacting of fill for such excess excavation or overexcavation shall be at the expense of the Contractor.

c. Payment.—* * * The unit price bid in the schedule for excavation for structures shall include the cost of all labor and materials for cofferdams and other temporary construction, of pumping and unwatering, including well points, and of all other work necessary to maintain the excavations in good order during construction * * *.

**HENRY CLAY MINING COMPANY,
INC.**

3 IBMA 360

Decided September 25, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by an Administrative Law Judge (Docket Nos. PIKE 72-196-P and PIKE 72-222-P), dated November 30, 1973, assessing civil penalties in the amount of \$200 for ten violations pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Modified.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

In determining the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries as required by section 303(b) of the Act, measurement of such volume is properly taken in the last open crosscut between the two entries by virtue of interpretative regulation (30 CFR 75.301-3(a)).

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

APPEARANCES: Richard V. Backley, Esq., Acting Assistant Solicitor, and Robert A. Cohen, Esq., Trial Attorney for appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

The Mining Enforcement and Safety Administration (MESA) filed Petitions for Assessment of Civil Penalties against Henry Clay Mining Company, Inc. (Clay) for alleged violations of the Federal Coal Mine Health and Safety Act of 1969 (Act). These alleged violations were cited in *Order of Withdrawal, No. 1 DDD, June 9, 1971*, and 11 separate Notices of Violation. At the conclusion of the hearing, the Administrative Law Judge (Judge) asked for proposed findings of fact and conclusions of law from both parties, to which only MESA responded. In his decision, issued November 30, 1973, the Judge dismissed the Petitions for Assessment based on the alleged violation cited in the Order of Withdrawal and one of the 11 Notices of Violation. He found that violations had occurred in the remaining ten instances, and assessed penalties thereon.

In this appeal, MESA contends that the Judge erred in dismissing only the Petition for Assessment for the violation cited in the Order of Withdrawal. The Order was issued

after Clay failed to timely abate a Notice of Violation alleging a violation of 30 CFR 75.301. The Notice stated that only 8,700 cfm of air was reaching the last open crosscut between the No. 1 entry and the No. 2 entry, whereas the cited regulation requires 9,000 cfm. The section 104(b) Order was issued when it was found that Clay could not maintain an air volume of 9,000 cfm after spending two hours moving brattices and curtains in attempting to abate the violation. The record indicates that Clay then took immediate steps to replace its ventilating fan, but only after the section 104(b) Order was issued. The location of the measurement of air volume and the result of that measurement are undisputed by either party. The measurement in question was taken at a point in the last open crosscut, between two developing entries.

In dismissing the Petition for Assessment at issue here, the Judge concluded that the word "reaching" as used in 30 CFR 75.301 meant "arriving at," and that, therefore, the measurement taken as described above does not comply with the regulation and will not establish a violation of the regulation.

Issue Presented

Whether the Judge erred in dismissing a petition for assessment for an alleged violation of 30 CFR 75.301 because he considered the air measurement to have been taken at an improper place.

September 25, 1974

Discussion

As specified in 30 CFR 75.301-3(a), readings of air measurements in implementation of the statutory provision, are taken as follows:

(a) When a single split of air is used the volume of air shall be measured *at* the last open crosscut in a pair or set of developing entries or the last open crosscut in any pair or set of rooms which shall be the last crosscut through the line of pillars that separates the intake and return air courses. When the split system of ventilation is used, the volume of air shall be measured *in* the last open crosscut through the line of pillars that separates the intake and return air courses of each split. [Italics added.]

[1] It appears that the Judge in defining the term "reaching," as used in the statute, to mean "arriving at" was, in effect, challenging the Secretary's interpretative regulation (30 CFR 75.301-3(a)), as inconsistent with the statute, 30 U.S.C. § 863, rather than determining whether or not the actual measurement of air was taken at a location consistent with the regulation. Since this section of the Act does not specify the location for air volume measurements, it is the duty of MESA to interpret reasonably the intent of the Act, which we believe has been done. Since "the last open crosscut," as used in the regulation, is an area rather than a point or line, the location for the measurement involved is further defined as a place in the crosscut in a pair of developing entries, which connotes to us a place in the crosscut *between* these two entries. This is precisely where the measurement involved

was taken. Therefore, we believe the Judge erred in concluding that the measurement was not taken in accordance with 30 CFR 75.301 and that the measurement does not establish a violation of that regulation. Accordingly, the Judge's dismissal of the Petition for Assessment for this violation must be set aside.

In determining the amount of penalty for this violation, we adopt the findings of the Judge as to the criteria of: (1) history of previous violations, (2) appropriateness of penalty in relation to size of the operator's business, and (3) effect on operator's ability to continue in business. We find his conclusions on these factors supported by the record. The record discloses that the operator knew of this ventilation problem and we, therefore, find it to be negligent. It also appears that the operator had taken steps toward abatement of the violation upon being cited, and exhibited good faith in abating it after realizing its seriousness. Concerning gravity of the violation, we find that it was non-serious inasmuch as the operator was supplying a flow of air very close to the minimum required. Considering the above finding, and those of the Judge, we find a penalty in the amount of \$50 is warranted for this violation.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY

ORDERED that the decision issued November 30, 1973, IS MODIFIED to the extent that MESA's Petition for Assessment of Civil Penalty alleging violations of 30 CFR 75.301 in connection with the issuance of *Order of Withdrawal No. IDDD, June 9, 1971*, IS REINSTATED and that Henry Clay Mining Company, Inc., IS ASSESSED \$50 for this violation and total penalties in the amount of \$250 be paid on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

ZEIGLER COAL COMPANY

3 IBMA 366

Decided *September 26, 1974*

Appeal by Zeigler Coal Company from a decision by an Administrative Law Judge (Docket No. BARB 73-84-P), dated February 28, 1974, assessing monetary penalties in the amount of \$4,950 for 12 violations pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969,¹ hereinafter "the Act."

Modified.

1. Federal Coal Mine Health and

Safety Act of 1969: Penalties: Mitigation

Allegations of economic loss due to unvacated orders of withdrawal which may have been improperly issued are properly excluded from consideration as a mitigating factor in determining a penalty assessment pursuant to section 109 (a) of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Elements of Proof

The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

3. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Generally

Where an operator demonstrates by a preponderance of the evidence that defective equipment was being repaired, was not being used, and was not to be operated until it met the required safety standards, no violation of the Act occurred.

4. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Reasonableness of Time

The reasonableness of time allowed to abate an alleged violation is not in issue in a proceeding under section 109(a) of the Act.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Richard V. Backley, Esq., Assistant Solicitor, and Mark M. Pierce, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

¹ P.L. 91-173, 88 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

September 26, 1974

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS
INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

Zeigler Coal Company (Zeigler) filed a petition for hearing and formal adjudication pursuant to section 109(a) of the Act following receipt of an amended proposed assessment from the Mining Enforcement and Safety Administration (MESA). A hearing was held before an Administrative Law Judge (Judge), who, by decision dated February 28, 1974, assessed Zeigler civil penalties in the amount of \$4,950 for 12 violations of the Act. Zeigler filed a timely Notice of Appeal with this Board of the Judge's decision and order with respect to seven of these violations representing civil penalties of \$4,350.² These seven violations were cited in four section 104(a) Orders and three section 104(b) Notices. In considering the alleged violations in each of the section 104(a) Orders, the Judge, in his decision, concluded that no imminent danger existed at the time of issuance, that such orders were "improvidently issued,"

but that a violation of the Act had occurred in each case for which he must assess a civil penalty.

On appeal, Zeigler contends that: (1) in assessing penalties for violations cited in a mistakenly issued section 104(a) order of withdrawal, loss of production should be considered in mitigation; (2) a ventilation violation cannot be established by an air quantity reading taken at an improper location; (3) a notice of violation should not be issued where the allegedly defective equipment had been taken out of service and the alleged violation was being abated prior to issuance of the notice; (4) it is improper for an inspector to allow, pursuant to MESA instructions, only 30 minutes for abatement of an alleged violation before issuing a section 104(b) order of withdrawal when he believes that three hours is more appropriate; and (5) a civil penalty of \$300 is excessive for minor, nonserious violations.

Issues Presented

Whether loss of production due to a mistakenly issued order of withdrawal should be considered in mitigation of the penalty imposed for a violation cited in such order.

Whether, as to an alleged violation of 30 CFR 75.301, the air quantity measurement was taken at the proper location within the mine.

Whether a notice of violation should issue for oil and grease accumulations on a coal drill when the drill had been taken out of serv-

² These seven violations are represented by: Order of Withdrawal No. 1 BMC, December 29, 1971, Notice of Violation No. 1 BMC, January 5, 1972, Notice of Violation and Order of Withdrawal No. 1 JML, March 3, 1972, Order of Withdrawal No. 1 JEM, March 3, 1972, Order of Withdrawal No. 1 DF, March 6, 1972, Order of Withdrawal No. 1 DF, March 10, 1972, and Notice of Violation No. 4 JTE, March 20, 1972.

ice and was being cleaned at the time the violation was cited.

Whether it is proper for an inspector to allow only 30 minutes to abate an alleged violation cited in a section 104(b) notice and then issue a section 104(b) order pursuant to instructions contained in the Bureau of Mines December 1971 Inspection Manual despite his personal judgment that a reasonable time to abate would have been three hours.

Whether a penalty of \$300 is excessive for minor, nonserious violations.

Discussion

[1] In the instant case, Zeigler contends on appeal that it lost over \$40,000 in revenue as a result of four mistakenly issued Orders of Withdrawal,³ and that the Judge failed to consider this loss in mitigation in determining the amount of the penalties to be assessed for the violations cited in the Orders. While the Judge opined that the withdrawal orders in question were "improvidently issued" he did not order them vacated. "Improvident" means not prudent and in Webster's 2nd College Edition is defined as meaning "failing to provide for the future," "lacking foresight or thrift." Nowhere did the Judge vacate the orders nor could he since the Board has held that the validity

of an order of withdrawal is not in issue in a section 109(a) penalty proceeding. *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, CCH Employment Safety and Health Guide, par. 16,608 (1973). As we read the Judge's decision in context he was merely weighing the gravity of the violation vis-a-vis the Order of Withdrawal. As this Board held in *Eastern Associated Coal Corporation*, 1 IBMA 233, 79 I.D. 723, CCH Employment Safety and Health Guide, par. 15,388 (1972), the fact that a violation resulted in an order of withdrawal may be considered in determining the gravity of the violation. Thus, the Judge apparently did not increase any penalty on the gravity factor by virtue of the issuance of the Orders of Withdrawal since he found, for various reasons, each of the Orders questioned to have been "improvidently issued." In other words it appears that the Judge weighed the gravity factor of the violations as if no Orders of Withdrawal were issued.

Furthermore, even if the Judge had vacated the Orders of Withdrawal the argument of Zeigler concerning economic loss must fall. This Board, in *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, CCH Employment Safety and Health Guide, par. 17,658 (1974) held that economic loss is to be considered as a mitigating factor only in those cases where the orders of withdrawal involved have been vacated prior to the section 109(a) penalty proceeding being adjudicated or are invalidated in a

³ These four Orders are: *Order of Withdrawal No. 1 BMC*, December 29, 1971, *Order of Withdrawal No. 1 JEM*, March 3, 1972, *Order of Withdrawal No. 1 DF*, March 6, 1972, and *Order of Withdrawal No. 1 DF*, March 10, 1972.

September 26, 1974

section 105(a) review proceeding which has been consolidated with the subject penalty proceeding. This case fits neither situation and therefore the alleged economic loss was properly excluded as a mitigating circumstance.

[2] In *Zeigler Coal Company*, 3 IBMA 78, 81 I.D. 173, CCH Employment Safety and Health Guide par. 17,615 (1974), the Board held:

* * * 30 CFR 75.301-3 does not specify the point at which "intake air" becomes "return air." The location at which air volume measurement is to be made is therefore subject to interpretation. At the time these two Notices were issued MESA's interpretation was that intake air became return air after it had passed the first working place in the section * * *. Zeigler does not allege that it lacked notice of MESA's interpretation, or that different readings would have resulted had the measurements been taken at other locations. * * *

In its brief Zeigler alleges that "bleeding of air through the entries could give a much higher reading at the far end of the line of rooms than at the beginning * * *." However, Zeigler offers no evidence to this effect. It appears from the record that the inspector took the questioned measurement at the location prescribed in the December 1971 Inspection Manual. Therefore, based upon our decision in *Zeigler, supra*, we hold that there is no merit in Zeigler's second contention, and the penalty assessed for this violation will not be disturbed.

[3] In *Plateau Mining Company*, 2 IBMA 303, 308, 80 I.D. 716, 718, CCH Employment Safety and

Health Guide par. 16,884 (1973), the Board held that:

The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

We believe *Notice of Violation No. 1 JML, March 3, 1972*, must be vacated based upon our decision in *Plateau, supra*. In the instant case, the inspector who issued the Notice testified that: (1) the piece of equipment involved was not energized at the time of the inspection; (2) the piece of equipment was being cleaned by one man at the time of the inspection; and (3) the piece of equipment could not be cleaned in a normal length of time by one man. We believe that the inspector's testimony is adequate to establish that no violation was present since the equipment was out of service and being cleaned at the time of inspection and prior to issuance of the Notice. Parenthetically, we note that the inspector's testimony that the coal drill could not be cleaned in a normal length of time by one man is immaterial to his determination of whether a violation occurred. Further, the fact that the equipment was being cleaned at the time of inspection warrants the inference that Zeigler intended to clean up the equipment before it reentered service. Accordingly, we hold that no violation occurred.

Therefore, this Notice is vacated and that the accompanying assessment of \$150 is set aside.

[4] Determination of the reasonableness of the amount of time allowed for abatement of a violation is the proper subject of a section 105 (a) proceeding under the Act. Under section 109 (a) of the Act, the Judge must determine whether a violation occurred and if so the appropriate penalty. Therefore, the reasonableness of the time allowed for abatement is not to be considered in a proceeding held under section 109 (a) of the Act.

In *Galloway Land Company*, 2 IBMA 348, 80 I.D. 78, CCH Employment Safety and Health Guide par. 17,011 (1973), the Board held that it will not disturb a decision of an Administrative Law Judge in the absence of a showing that the evidence compels a different result. In contending that a penalty of \$300 is excessive for a nonserious violation, Zeigler has failed to show that the Judge did not consider fairly the six statutory criteria of section 109 (a) of the Act in assessing the above penalty. Zeigler has not shown that the amount of the penalty is inappropriate to the size of its business or that it would have a seriously adverse effect on its ability to continue in business. The Judge's finding with respect to these and the other four statutory criteria are supported by the record in this case. Accordingly, the Board will not disturb the penalties assessed by the Judge.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS MODIFIED in that *Notice of Violation No. 1 JML, March 3, 1972, IS VACATED* and its accompanying assessment of \$150 IS SET ASIDE. IT IS FURTHER ORDERED that Zeigler Coal Company pay penalties in the total amount of \$4,800 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

INTERMOUNTAIN EXPLORATION COMPANY

17 IBLA 261

Decided *September 27, 1974*

Appeal from decision of Utah State Office, Bureau of Land Management, rejecting application for modification of coal lease SL 050641.

Affirmed.

1. Coal Leases and Permits: Leases

Under 43 CFR 3524.2-1, an application to modify a coal lease without competitive bidding, to include contiguous coal deposits, will be denied if it is determined and not controverted that the additional lands requested can be developed as part of an independent operation or

September 27, 1974

that there is a competitive interest in them.

APPEARANCES: H. Byron Mock, Esq., Mock, Shearer and Carling, Salt Lake City, for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
GOSS*

*INTERIOR BOARD OF LAND
APPEALS*

Intermountain Exploration Company appeals from a decision of the Utah State Office, Bureau of Land Management, issued February 15, 1974, rejecting appellant's amended application for modification of its coal lease.

On December 6, 1938, the lease for 160 acres was originally issued to Mary Hortense Larsen, Administratrix of the Estate of Lawrence H. Larsen, deceased, and Leroy Rigby. Following a series of assignments, the Bureau of Land Management approved appellant as holder of the lease on May 10, 1973. In its request for modification, filed August 6, 1973, appellant applied for an extension of the lease to include an additional 2364.40 acres.¹ Appellant explained:

The small size of the lease precludes the modern development of the coal mine on a basis of efficient large-tonnage underground productions. For long range production and mine planning, and for

arranging for orderly growth of the operation, it is necessary for additional coal reserves to be available to this mine. Prospecting Permit Applications U-15240 and U-15241 were acquired so that necessary exploration work could be performed and adequate reserves established. After we had purchased the interests in such applications, the Department of Interior policy of rejecting all exploratory permit applications took effect. We have appealed the rejections since we must obtain additional reserves and are willing to make the necessary exploration expenditures. Therefore we ask our lease to be extended to cover most of the lands covered by the prospecting permit applications.

In a memorandum from the Director, Geological Survey, to the Utah State Director, Bureau of Land Management, the Geological Survey recommended that the requested modification be rejected; stating:

It is the opinion of the Geological Survey that the lands requested by modification can be developed as an independent operation and that there is a competitive interest in them. Therefore, the modification as requested does not meet the provisions for modification under section 3 of the Mineral Leasing Act.

Also, since the mine on the leased lands has been idle for several years, the provision under section 4 of the Act which allows modification when the mine will be worked out in 3 years is not applicable.

This recommendation was incorporated into the State Office decision rejecting the application, which decision sets forth the following:

Your application for modification of Coal Lease SL 050641 which was filed in this office August 6, 1973, is rejected for the reasons that: (1) it fails to meet the requirements of Sec. 3 of the Mineral Leasing Act [30 U.S.C. § 203 (1970)] for

¹ In a letter dated March 21, 1974, from the State Office to appellant's attorney, the State Director noted that appellant, by letter of August 3, 1973, had requested extension or modification of the lease for land describing 2400 acres. The State Director explained that upon review it was determined the land described actually totaled 2364.40 acres.

modification, since the lands applied for can be developed independently and there is a competitive interest in them; and (2) the mine on the leased lands has been idle for several years; therefore, Sec. 4 of the Act [30 U.S.C. § 204 (1970)], which allows modification of a lease if the mine will be worked out in 3 years, is not applicable.

The notice of appeal filed March 15, 1974, contained the following statement of reasons:

The decision was non-responsive to the application which was the request for extension of the 160 acre lease for additional acreage to create an economic sized unit as prescribed by the regulations. If less than the total amount of acreage applied for will provide such[,] that is acceptable. The appellant had sought to obtain coal permits² which he could explore at his expense to obtain the additional acreage required, but such permit applications were rejected without substantive review. The only procedure available to the applicant to obtain lands which are unproved and which must be explored was by the procedure suggested here, namely, extension of the lease under the pertinent regulations.

[1] Departmental regulation 43 CFR 3524.2-1 is specific as to when a lessee may obtain modification of his coal lease. The section provides in part:

§ 3524.2-1 Coal.

(a) *Under section 3 of the Act*—(1) *Application.* Under section 3 of the Act (30 U.S.C. 203), a lessee may obtain a modification of his lease to include coal lands or coal deposits contiguous to those

embraced in his lease if the authorized officer determines that it will be to the advantage of the lessee and the United States. The lessee shall file his application for modification in duplicate in the proper land office, describing the additional lands desired, the needs and reasons for and the advantage to the lessee of such modification.

(2) *Availability*—(i) *Noncompetitive.* Upon determination by the authorized officer that the modification is justified and that the interest of the United States is protected, the lease will be modified without competitive bidding to include such part of the land or deposits as he shall prescribe.

(ii) *Competitive.* If however, it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them, they will be offered as provided in subpart 3520.

(b) *Under section 4 of the Act*—(1) *Application.* Under section 4 of the Act (30 U.S.C. 204) upon satisfactory showing by the lessee that all of the workable deposits of coal within a tract covered by the lease will be exhausted, worked out or removed within 3 years thereafter, an additional tract of land or coal deposit may be leased. Application shall be filed in duplicate in the proper office and shall contain a description of the lands requested, estimated recoverable reserves, future plan of operation for such reserves and for any lands requested and the proposed method of entry into such lands.

(2) *Availability.* If the lands or coal deposits of any part thereof are found to constitute an acceptable leasing unit, they will be offered for leasing as provided in subpart 3520. If the applicant be the successful bidder and the additional lands can be practicably operated with the applicant's leasehold as a single mine or unit, the additional lands may be included in a modified lease.

Appellant does not deny that the lands can be developed independ-

² These applications for permits were not included in the case file. We note, however, that Order No. 2952 (38 F.R. 4682) precludes the issuance of any new coal prospecting permits pending preparation of a program for more orderly development of the nation's coal resources. *Joan Walstrom*, 15 IBLA 401 (1974).

September 27, 1974

ently; nor does he deny that there is a competitive interest in the lands;³ nor does he allege that the mine will be worked out in three years. In the absence of any clear and definite showing that the determinations of the Geological Survey—as to independent development and competitive interest—were not properly made, the determination will not be disturbed. *McClure Oil Company*, 4 IBLA 255 (1972). Appellant's allegation that additional lands are necessary to make his leasehold an economic entity is thus immaterial under the regulation. For these reasons, it is necessary to deny the appeal.⁴

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed.

JOSEPH W. GOSS,
Administrative Judge.

³ Under *Western Slope Carbon, Inc.*, 5 IBLA 311 (1972), an application to modify a coal lease to include additional deposits will be denied if the additional lands can be developed independently or if there is a competitive interest in them.

⁴ In appellant's amended application there is no request for any acreage less than the 2364.40 acres. In the Bureau's "Case Briefing Report" there is a notation dated December 12, 1973, that the Bureau was advised by the U.S.G.S. that if the request for modification were for only 80 or 120 acres, it would probably recommend approval, i.e., W $\frac{1}{4}$ SW $\frac{1}{2}$ sec. 25, or E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 28. While this decision is not intended to foreclose any proper application for such reduced acreage, approval thereof may only be granted if the parcel qualifies under section 3524.2-1.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

DOYLE MILLING CO., INC.

17 IBLA 270

Decided September 27, 1974

Appeal from a decision by the District Manager, Coos Bay, Oregon, District Office, Bureau of Land Management, denying a request to recalculate appellant's liability under timber sale contracts 14-11-0008(8)-312 and 14-11-0008(8)-313.

Reversed and remanded.

1. Timber Sales and Disposals— Words and Phrases

"Market value of the timber remaining." In section 11 of Form 5430-3 (1966)—Contract for the Sale of Timber, "Cruise Sale"—the above phrase refers to a single market value for the entire remaining timber.

2. Timber Sales and Disposals

Upon expiration of time for cutting and removing timber under a Form 5430-3 (1966) lump sum timber sale contract, the purchaser is entitled to a credit against the amount due, such credit being in the amount of the market value of the timber remaining on the contract area, or its pro rata contract price, whichever is less, computed on a lump sum rather than a per species basis.

APPEARANCES: Paul L. Roess, Esq., of McKeown, Newhouse, Foss & Whitty, Coos Bay, Oregon, for appel-

lant. Donald P. Lawton, Esq., Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

*OPINION BY
ADMINISTRATIVE JUDGE
GOSS*

*INTERIOR BOARD OF
LAND APPEALS*

Doyle Milling Co., Inc., has appealed from a decision by the Coos Bay District Office, Bureau of Land Management, dated December 8, 1972, denying appellant's request for a recalculation of its remaining liability for failure to perform under two timber sale contracts, 14-11-0008(8)-312 and 14-11-0008(8)-313. See Appendix 1, p. 610.

The history of these contracts is set forth in *Doyle Milling Company*, 6 IBLA 190 (1972), in which this Board affirmed the District Office's denial of one year extensions on the contracts. The contracts terminated without any timber having been removed by appellant. Following that decision the case file was returned to the District Office in order to determine whether a credit for the timber remaining in the contract area was available against the purchase price due the Government. Such a credit is available pursuant to section 11 of the Bureau of Land Management's standard timber cruise sale contract, Form 5430-3 (1966). Section 11 reads:

If the time specified for cutting and removal of timber has expired or the

contract has been cancelled, the Purchaser shall be entitled to a credit against any amount which is due and owing to the Government under this contract, of the market value of the timber remaining on the contract area, or its contract price per unit for such timber, whichever is less. The Authorized Officer shall establish market value as soon as possible after the date of expiration or cancellation through *actual resale or by appraisal*. There shall be deducted therefrom such amount as the Authorized Officer determines adequate to cover the costs to the Government resulting from the Purchaser's failure to perform, including but not limited to the costs of appraising and of administering any resale of the timber. (*Italics added.*)

Previously, on October 27, 1972, the timber remaining on the tracts covered by contracts 312 and 313 was sold at oral auction.¹ Appellant was awarded the two contracts, and it subsequently assigned them to Henry Westbrook III. Appellant's re-purchase price for the timber remaining uncut under the two contracts was:

Contract 312... \$194,496.70 (Lump sum).
Contract 313... \$193,897.95 (Lump sum).

See Appendix 2, p. 611.

By letter dated November 14, 1972, the District Manager informed appellant that under contract 312 its remaining liability was \$126,068.75, for which the District Manager made demand. The computations of the District Manager were summarized as follows:

¹ It will be noted from Appendixes 1 and 2 that the quantities estimated prior to the resales vary from the quantity estimates prior to the original contracts.

September 27, 1974

Total purchase price		\$327,104.00
Payments completed		<u>-11,600.00</u>
Unpaid purchase price		\$315,504.00
Value of remaining timber:		
Douglas fir, 1970 MBF at \$90	\$177,300.00	
Western hemlock, 332 MBF at \$38	12,616.00	
Western redcedar, 18 MBF at \$33	594.00	
	<u>\$190,510.00</u>	
Cost of reappraisal	-1,074.75	
	<u>\$189,435.25</u>	<u>-\$189,435.25</u>
Remaining liability		\$126,068.75

By letter of the same date appellant was also informed by the District Manager that under contract 313 its remaining liability was \$143,966.60, the District Manager's computations being:

Total purchase price		\$322,514.80
Payments completed		<u>-14,800.00</u>
Unpaid purchase price		\$307,714.80
Value of remaining timber:		
Douglas fir, 1577 MBF at \$88.05	\$138,854.85	
Grand fir, 1041 MBF at \$23.35	24,307.35	
Western hemlock, 12 MBF at \$47.30	567.20	
Western redcedar, 24 MBF at \$48.35	1,160.40	
Red alder, 152 MBF at \$3.00	456.00	
	<u>\$165,346.20</u>	
Cost of appraisal	-1,598.00	
	<u>\$163,748.20</u>	<u>-\$163,748.20</u>
Remaining liability		\$143,966.60

It will be noted that for some species the District Manager used the original contract "price per unit" and for some species he used the resale contract "price per unit," selecting the lower of the two. For example, in contract 312 he computed the credit for Douglas fir on the basis of the resale contract "price per unit" of \$151. For western hemlock he computed the credit on the basis of the \$38 original contract "price per unit," rather than on the resale contract "price per unit" of \$48.65. Appellant by letters dated November 28, 1972, requested the District office to recalculate the remaining liability due the Govern-

ment under both of the original contracts. The District Manager on December 8, 1972, denied such request and appellant has appealed such denial.

Appellant admits its liability under the contracts; however, it disputes the Government's method of computing the damages under section 11 of the contracts. The District Office interpreted such section as availing the Government of the option of determining the credit for remaining timber on the basis of original contract price per unit or actual resale price, *separately* for each species included in the contracts.

Appellant contends that such an interpretation is erroneous and that the Government was bound to assess credit on a lump-sum basis, choosing for each contract the lesser of total actual resale value or contract price per unit for the entire contract, rather than separately comparing contract price with resale value for each species.

The District Office interpretation is based in part upon a memorandum opinion rendered by the Office of the Regional Solicitor, Portland, Oregon, and directed to the Oregon State Director, Bureau of Land Management, dated September 29, 1972. The conclusion therein was that in computing credit, the contract price per unit for each species had to be compared with the market value *for each species* and the lesser of the two used to determine the amount of credit available to the purchaser. The memorandum ex-

plained that the original draft of section 11 read “* * * of the market value of the timber remaining on the contract area, or *its contract price per unit, per species*, whichever is less.” Subsequently, “per species” was deleted as redundant and the language changed to its present form, “its contract price per unit for such timber.” If the language deleted from section 11 was redundant, then the deletion did not affect the meaning of the provision.

The memorandum also cites language from various decisions in support of its position; however, in none of these cases was the point at issue discussed or ruled upon.

Both counsel have cited the Uniform Commercial Code § 2-706, Seller's Resale Including Contract for Resale. The Government quotes § 2-706(6) which reads, “The seller is not accountable to the buyer for any profit made on any resale.” This principle is well established and is not disputed by appellant. However, such principle is not applicable herein, as the remaining timber was sold on a lump-sum basis which was less than the original contract price. Appellant cited § 2-706(1) as stating the general rule for the amount recoverable by a seller upon resale:

* * * [T]he seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover *the difference between the resale price and the contract price* * * *. (Italics added.)

Appellant points out that “profits” on the one hand, and damages by

way of a deficiency on the other, are mutually exclusive concepts. Appellant argues that we are concerned with a deficiency and the general rule for determining the amount recoverable by a seller upon resale should be applicable, that principle having been incorporated into section 11 of the contracts.

We can find no substantive authority for the District Office per species interpretation. First, it will be noted that section 11 states the market value will be determined "through actual resale or by appraisal." The only "actual resale[s]" here concerned were resales on the lump sum rather than unit basis. The prices per unit listed in the resale contracts are not the contract prices to be paid. In BLM Manual 5424, Appendix 1, page 31, interpreting section 11, it is significant there is no mention that credit is to be computed on a per species basis when the total market value of the timber is less than the value computed on the basis of the original contract.

[1, 2] The phrase "Market value of the timber remaining" refers to a single market value for the entire remaining timber. For the above reasons we conclude that the correct method of assessing credit available to a defaulting purchaser under these circumstances is upon the basis of the lump-sum method. The purchaser is entitled to credit for the amount of the market value of the timber remaining on the contract

area, or its pro rata contract price² for such timber, whichever is less. Appellant herein will also receive credit for the amount he has paid, less the cost of reappraisal and resale as provided in section 11.

In the present case, appellant's remaining liability under the contracts is:

Contract 312

Original contract price	\$327, 104. 00
Cost of reappraisal and resale	1, 074. 75
	<hr/>
	\$328, 178. 75
Installment paid	— 11, 600. 00
Amount received on resale	—194, 496. 70
	<hr/>

Amount due the Government	\$122, 082. 05
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Contract 313

Original contract price	\$322, 514. 80
Cost of reappraisal and resale	1, 598. 00
	<hr/>
	\$324, 112. 80
Installment paid	— 14, 800. 00
Amount received on resale	—193, 897. 95
	<hr/>

Amount due the Government	\$115, 414. 85
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Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

² We note that the Director, Bureau of Land Management, in a memorandum dated January 5, 1973, transmitting the files herein to this Board, stated that: "The contract for the sale of timber is being revised. We plan to reword Section 11 so that it can be clearly interpreted that the 'lump-sum' method is to be used to determine credit value of the remaining timber." If section 11 is to be revised for future lump-sum contracts, it would seem that the words "contract price per unit" should be clarified.

the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded.

JOSEPH W. GOSS,
Administrative Judge.

WE CONCUR:

Anne Poindexter Lewis,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

APPENDIX I

Original contract 312 sets forth the following estimates:

Species	Estimated volume or quantity (units specified)	Price per unit	Amount of estimated volume or quantity × unit price
Douglas fir.....	2, 076 M bd. ft.	\$151. 00	\$313, 476. 00
Western hemlock.....	343 M bd. ft.	38. 00	13, 034. 00
Western redcedar.....	18 M bd. ft.	33. 00	594. 00
Totals.....	2, 437 M bd. ft.		\$327, 104. 00

In original contract 313, the following estimates are listed:

Species	Estimated volume or quantity (units specified)	Price per unit	Amount of estimated volume or quantity × unit price
Douglas fir.....	1, 895 M bd. ft.	\$151. 00	\$286, 145. 00
Grand fir.....	1, 406 M bd. ft.	23. 35	32, 830. 10
Western hemlock.....	6 M bd. ft.	47. 30	283. 80
Western redcedar.....	30 M bd. ft.	48. 35	1, 450. 50
Red alder.....	153 M bd. ft.	11. 80	1, 805. 40
Totals.....	3, 490 M bd. ft.		\$322, 514. 80

September 27, 1974

APPENDIX II

In the contracts for repurchase of the timber remaining on the area of original contracts, the following estimates are set forth:

Timber from Contract 312

Species	Estimated volume or quantity (units specified) *	Price per unit	Amount of estimated volume or quantity × unit price
Douglas fir-----	1, 970 M bd. ft.	\$90. 00	\$177, 300. 00
Western hemlock-----	332 M bd. ft.	48. 65	16, 151. 80
Western redcedar-----	18 M bd. ft.	58. 05	1, 044. 90
Totals-----	2, 320 M bd. ft.		\$194, 496. 70

Timber from Contract 313

Species	Estimated volume or quantity (units specified)	Price per unit	Amount of estimated volume or quantity × unit price
Douglas fir-----	1, 577 M bd. ft.	\$88. 05	\$138, 854. 85
Grand fir-----	1, 041 M bd. ft.	50. 10	52, 154. 10
Western hemlock-----	12 M bd. ft.	63. 55	762. 60
Western redcedar-----	24 M bd. ft.	69. 60	1, 670. 40
Red alder-----	152 M bd. ft.	3. 00	456. 00
Totals-----	2, 806 M bd. ft.		\$193, 897. 95

**ESTATE OF ROE KAHRAHRAH
(DECEASED COMANCHE
UNALLOTTED)**

3 IBIA 125

Decided October 18, 1974

Appeal from an order denying petition for rehearing.

Reversed in Part and Remanded.

**1. Indian Probate: State Law:
Applicability to Indian Probate,
Testate—390.2**

A state law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills.

**2. Indian Probate: State Law:
Applicability to Indian Probate,
Testate—390.2**

A state law providing that a child shall take as if the parent died intestate if the child is not named or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. § 373.

APPEARANCES: Richard S. Roberts, for Alicia Faye Kahrahrhah Wilson, Bertha Komacheet-Kahrahrhah, Phoebe Ann Kahrahrhah Heath and Bernard Kahrahrhah, appellants; Vincent Knight of the Legal Aid Society of Oklahoma County, Inc., for Krandal Roe Kahrahrhah, a minor, appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

**INTERIOR BOARD OF
INDIAN APPEALS**

**Alicia Faye Kahrahrhah Wilson,
Bertha Komacheet Kahrahrhah,**

Phoebe Ann Kahrahrhah Heath and Bernard Kahrahrhah, hereinafter referred to as appellants, through their attorney, Richard S. Roberts, have appealed from a decision of an Administrative Law Judge, dated November 9, 1973, denying their petition for rehearing of the estate herein whereon an Order Approving Will and Decreeing Distribution was issued on May 11, 1973.

Roe Kahrahrhah, hereinafter referred to as testator, an unallotted Comanche Indian of the State of Oklahoma, died testate on November 19, 1971, at the age of 56 years.

After being duly noticed, a hearing was held at Anadarko, Oklahoma, on March 8, 1973, for the purpose of ascertaining the heirs at law of the testator, claims against the estate, if any, and the probate of the purported last will and testament dated December 12, 1968. From the evidence adduced at the hearing the decedent's last will and testament of December 12, 1968, was approved by the Judge.

The testator in said will and testament, as approved, made specific devises of trust interest to the appellants. The rest and residue of his trust estate, if any there be, was devised to his estranged wife, Bertha Komacheet Kahrahrhah.

The Judge in his Order Approving Will and Decreeing Distribution, dated May 11, 1973, awarded to Krandal Roe Kahrahrhah, appellee herein, as a posthumous son, an undivided one-sixth interest in

all of the testator's trust and restricted property thereby reducing the respective interests of the devisees to an undivided five-sixth interest.

Phoebe Ann Kahrahrh Heath, one of the devisees, filed a petition for rehearing on July 2, 1973, setting forth the following reasons in support of her petition:

1. Said Order is unjust to the decedent and to this lawfully designated beneficiary and is contrary to law.

2. Said Order approved claims without proof as required by rules and regulations for the protection of restricted Indians.

3. Said Order is contrary to the Laws of the State of Oklahoma as regards Descent and Distribution where an illegitimate child offers no proof of paternity. There is no proof that the child named Krandall Roe Kahrahrh in his birth certificate is the son of the deceased Roe Kahrahrh.

4. Said Order constitutes an arbitrary substitution, in fact and in law, of the opinion of the Administrative Law Judge which is contrary to the material relevant and competent evidence. Krandall Roe Kahrahrh should not be entitled to a $\frac{1}{6}$ interest in this Estate.

5. Said Order fails to consider that the beneficiaries were without counsel and as a result were unable to have their day in court.

6. The DATA FOR HEIRSHIP FINDING AND FAMILY HISTORY which lists Esther Jean Parker as a common law wife and Krandall Roe Kahrahrh as a son is without foundation or fact.

The Judge on November 9, 1973, denied the petition for rehearing. Bernard Kahrahrh, for himself, and for the other devisees, under the will of December 12, 1968, filed on January 3, 1974, a timely appeal from the denial.

Aside from the issue of the validity of creditors' claims, the reasons given in support of the appeal are substantially the same as those given in the petition for rehearing hereinabove set forth and need not be repeated.

Considering the reasons, there appears to be only one issue to be resolved by this Board, which is:

Was the Judge in error in holding that the posthumous son was entitled to share in a testator's estate as if he had died intestate?

We disagree with the Judge in holding that the posthumous son was entitled under state law (84 Okla. Stat. Ann. § 131 (1970)) to share in the testator's estate as if he had died intestate.

[1 & 2] In the *Estate of Loretta Pederson*, 1 IBIA 14, 77 I.D. 270 (1970), this Board held that a state law which provides that a child who is not named or provided for in the will of his parents shall take as if the testator died intestate *is not applicable to Indian wills* and that such wills are governed by federal law, Act of February 14, 1913, 37 Stat. 678 and regulations promulgated by the Secretary of the Interior. (*Italics added.*)

The purpose of the February 14, 1913 Act, *supra*, was to allow Indians a right to make a will disposing of trust property free of state restrictions as to portions to be conveyed and as to the object of the testator's bounty, *Blanset v. Cardin*, 256 U.S. 319 (1921). It is well settled that a state law which provides that when a child is not mentioned

October 29, 1974

in a will he shall take an intestate's share has no application to Indian wills. *Estate of Harry Shale*, IA-880 (November 21, 1958). The Examiner (now Administrative Law Judge) is not bound to apply a state statute regarding pretermitted heirs. *Estate of Charles Clement Richard*, IA-1260 (July 15, 1963). Absent an act of Congress, the Secretary, in determining the rights of pretermitted heirs in Indian probate matters, will not follow any state statutes dealing with the subject, *Estate of William Cecil Robedeaux*, 1 IBIA 106, '78 I.D. 234 (1971).

In light of the foregoing decisions, the decision of the Judge in allowing Krandall Kahrahrh by virtue of 84 Oklahoma Statutes Annotated § 131 (1970), an undivided one-sixth share in the testator's trust estate as if the testator had died intestate, should be reversed and the matter remanded to the Judge for the issuance of an appropriate order consistent with this decision and with the provisions of the approved last will and testament of Roe Kakrahrh, dated December 12, 1968.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge, dated July 7, 1972, only insofar as it allows Krandall Kahrahrh an undivided one-sixth interest in the estate herein is REVERSED and the matter is REMANDED to the Judge for the

purpose of issuing an appropriate order consistent with this opinion and with the provisions of Roe Kahrahrh's will of December 12, 1968.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

APPEAL OF EVERGREEN ENGINEERING, INC.

IBCA-994-5-73

Decided October 29, 1974

Contract No. 53500-CT2-258, Imperial Sand Dunes Road Project, Bureau of Land Management.

Motion to Dismiss—Granted in Part.

1. Rules of Practice: Appeals: Discovery—Rules of Practice: Appeals: Dismissal

Where a contractor failed to respond to interrogatories propounded to it pursuant to an Order of the Board, on the ground that it did not receive a copy of the interrogatories, which were served upon it by certified mail, and the record contained a Postal Service form showing receipt by the contractor, the Government's motion to apply sanctions against the contractor is granted and the claim relating to the information sought by the interrogatories is dismissed without prejudice to reinstatement if the interrogatories are responded to in 30 days.

APPEARANCES: Mr. Carl L. Bybee,
President, Evergreen Engineering,

Inc., Tempe, Arizona, for the appellant; Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

Order Dismissing Appeal in Part

The Government has moved to dismiss this appeal, under Section 4.127 of our rules (43 CFR 4.127)¹ on the ground that the appellant failed to answer written interrogatories propounded to it pursuant to an Order of the Board. The appellant's response to the motion is that it "never received any interrogatories in any form * * *."

This appeal arose out of a road construction project contract in the amount of \$235,206.10, which was increased by one bilateral and one unilateral modification to \$300,-887.60. Before us are claims by the appellant totaling approximately \$225,000 which the contracting officer has denied.

Although its full extent is unclear from the record before us, a major element of the appeal, according to Department counsel, involves work performed by Massey Sand and Rock Co., a subcontractor. This

work precipitated litigation by Massey against the appellant, Evergreen's surety, and the Government, in the United States District Court in California, which the Government believes was settled by the appellant for the sum of \$65,000 some time after October 5, 1973.

Department counsel contends that, in view of their apparent effect on this appeal, the details of the settlement, as well as the agreement with Massey, should be made available to the Government. His position is that knowledge of the terms of the subcontract is essential in order to determine whether the Massey claim is cognizable by the Board under *Severin v. United States*, 99 Ct. Cl. 43 (1943). He maintains that discovery is also necessary to ascertain the impact of the settlement on the issues in the appeal.

Consequently, after the appellant failed to respond to a request to furnish such information voluntarily, the Government filed a motion dated November 30, 1973, for an order permitting it to serve written interrogatories upon the appellant concerning the settlement; and to inspect the subcontract and other documents related to the settlement. No objection having been received, the Board issued an Order on December 19, 1973, granting the motion.

In the meantime, however, presumably sparked by the motion and Department counsel's earlier requests, the appellant sent him two letters, dated December 11, 1973. One purportedly contained a copy

¹ Sec. 4.127 provides as follows:

"In the event of failure of a party to comply with a request of the Board for production of documents or other material, * * * or failure to answer written interrogatories * * * without showing just cause or excuse for such failure to the Board, the Board may (a) decide the fact or issue relating to material which the Board has requested to be produced, or relating to what might have been elicited from the person whose testimony was requested, in accordance with the claim of the other party or in accordance with other evidence available to the Board; (b) dismiss all or part of an appeal in appropriate circumstances; or (c) make such other ruling as the Board determines is just and proper."

October 29, 1974

of the Massey subcontract, but did not, according to Department counsel. The second mentioned that the settlement was entered into at the urging of the appellant's surety.

Although Department counsel regarded the appellant's responses as unsatisfactory, he believed they evinced a desire to cooperate. Accordingly, by letter dated December 26, 1973, he advised the appellant that the Board's Order would be implemented only "as a last resort," if the information was not forthcoming voluntarily. So far as we can determine from the record before us, however, the appellant neither provided any additional information nor made any response to the Government since its letters of December 11, 1973.

Ultimately, then, on June 17, 1974, the Government served proposed interrogatories on the appellant, to be answered within thirty days. They sought information relating solely to Massey's performance under the subcontract and the terms of the settlement. No request was made for the production of any documents except the subcontract.

Upon appellant's failure either to object or respond to the interrogatories, after more than thirty days had elapsed, the Government filed the motion before us under sec. 4.127, on August 9, 1974. The Board then issued an Order on August 14, 1974, directing the appellant to show cause why the appeal should not be dismissed, as requested, because of its failure to furnish answers to the interrogatories. It was this Order

which apparently precipitated appellant's response, by letter dated September 3, 1974, that "interrogatories in any form" were "never received."

In deciding the only other application for sanctions to come before us since our rule 4.127 was promulgated in 1969, we held that something more is required than mere noncompliance.² If the party against whom sanctions are sought demonstrates just cause or excuse for its default, the rule will not be invoked.

The appellant, however, has not made any attempt to justify its conduct. At no time did it object to the substance or form of the interrogatories. It did not contest the Government's motion which culminated in our Order of December 19, 1973, permitting interrogatories to be propounded. It has not asserted that the Order was not received. It has not claimed that its letters of December 11, 1973, to the Government furnished the information desired or constituted compliance.

We have also noted that the appellant is not represented by an attorney in this case. Boards traditionally have applied procedural rules less stringently against contractors appearing for themselves.³ In this case, however, the appeal file contains factual and legal

² *M.T.F. Industries, Inc.*, IBCA-977-11-72 (July 17, 1973), 73-2 BCA par. 10,145.

³ See *Isakson Construction Company*, GS-BCA No. 3979 (May 10, 1974), 74-1 BCA par. 10,640; *J.L. Ooe Construction Co., Inc.*, NASA BCA No. 965-83 (July 27, 1967), 67-2 BCA par. 6472.

memoranda by the appellant which clearly demonstrate its ability to comprehend the substantive and procedural niceties of Government procurement law.

The appellant's sole explanation for defaulting is that it did not receive the interrogatories. Non-receipt, of course, would constitute a good excuse, but here the only evidence before us points entirely to the contrary. The interrogatories were sent by certified mail—return receipt requested, properly addressed, and, according to the Postal Service Form 3811, were received by the appellant on June 26, 1974. In the absence of any evidence to the contrary by the appellant the return receipt showing delivery is controlling. A mere denial of receipt is insufficient to overcome such *prima facie* proof of service.⁴

[1] Accordingly, on the record before us we are compelled to conclude that the interrogatories were received by the appellant. We are further constrained to find that the appellant has demonstrated neither just cause nor sufficient excuse for not responding and thus failing to comply with our Order. Whatever brought about the appellant's default, it has impeded the orderly processing of this appeal and the functioning of this Board. The imposition of sanctions is therefore warranted, although we undertake

such a drastic measure with extreme reluctance.

The Board has wide latitude under sec. 4.127 not only to determine if sanctions should be invoked but also the nature of the penalty. We may decide the fact or issue relating to the Massey Sand and Rock Co. subcontract in accordance with the position of the Government, or we may dismiss all or part of the appeal, or make such other ruling as we determine to be just and proper.

It appears from the record before us that Massey was involved with a claim for hot bituminous concrete relating to Bid Item 17. We are not otherwise able to determine precisely what additional work, if any, was performed under the Massey subcontract. Consequently, in the absence of such information, and by reason of the state of the pleadings, we are in no position to decide any specific facts or issues which pertain to Massey in favor of the Government, as we are permitted to do under sec. 4.127.

Accordingly, we regard dismissal of the hot bituminous concrete claim as the only appropriate sanction here. That aspect of the appeal is hereby dismissed without prejudice to reinstatement if the interrogatories previously propounded are responded to and a copy of the Massey subcontract is produced within 30 days after receipt of a copy of this Order. However, should the appellant fail to com-

⁴See *American Ligurian Company, Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 21, 66-1 BCA par. 5326, at 25, 027; *Frederick O. Scheven*, ASBCA No. 15739 (June 21, 1971), 71-2 BCA par. 8927.

ply with the terms of this Order, the hot bituminous concrete claim will be dismissed with prejudice.

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

BROWN LAND COMPANY, APPELLANT, THE CLEVELAND-CLIFFS IRON COMPANY, APPELLEE

17 IBLA 368

Decided October 29, 1974

Appeal from decision of Wyoming State Office, dismissing adverse claims against mineral patent applications W-42392 and W-42393.

Reversed and remanded.

1. Appeals—Rules of Practice: Generally—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Service on Adverse Party

Where an appellant serves appellee, rather than appellee's counsel of record, with the notice of appeal and statement of reasons, and it appears that appellee's response to those documents reflects a full understanding of the crucial issues involved, summary dismissal of the appeal under 43 CFR 4.402 need not be invoked, and will not be invoked in appropriate situations.

2. Accounts: Fees and Commissions—Accounts: Payments—Mining Claims: Generally—Mining Claims: Possessory Right—Payments: Generally

Where filing fees for adverse claims against mineral patent applications are tendered timely to the appropriate Bureau of Land Management office, and such office erroneously refuses to receive such payment, and accepts payment therefor one day later upon recognition of its error, the payment may be properly regarded as having been made as of the date of tender thereof.

3. Administrative Authority: Generally—Administrative Practice—Mining Claims: Possessory Right

Where an asserted adverse claim is filed timely against a mineral patent application, and suit is commenced timely in a court of competent jurisdiction, the Department is not obligated to decide whether the asserted adverse claim is a proper claim within the ambit of 30 U.S.C. §§ 29, 30 (1970), but may suspend action on the mineral patent application to await the result of the judicial proceedings.

APPEARANCES: Daniel M. Burke, Esq., Casper, Wyoming, for appellant; R. Lauren Moran, Esq., of Lohf & Barnhill, P.C., Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Brown Land Company has appealed from a decision, dated January 14, 1974, rendered by the Wyoming State Office, Bureau of Land Management (BLM), which dismissed its adverse claims filed against the mineral patent applications W-42392 and W-42393 of the

Cleveland-Cliffs Iron Company. The adverse claims were dismissed because the \$10 filing fee required by the pertinent regulation, 43 CFR 3871.1(d), to be paid with each adverse claim, was not paid timely.

The mineral patent applications were the subject of a "Notice of Application for Mineral Patent," whose publication commenced October 25, 1973. Under Rev. Stat. § 2325, *as amended*, 30 U.S.C. § 29 (1970), an adverse claim must be filed with the Manager of the proper land office prior to the expiration of 60 days from the date of first publication. The expiration date in this case was December 26, 1973, since the office was officially closed on December 24 and 25, 1973 (43 CFR 1821.2(e)). *Gwillim v. Donnellan*, 115 U.S. 45, 49 (1885). See *Dahl v. Rawnheim*, 132 U.S. 260 (1889), and cases cited in notes 182-84 following 30 U.S.C.A. § 29 (1971).

Appellant asserts in the main that its agents endeavored to pay the \$20 filing fees on December 26, 1973, but that they were informed that such filing fees were "not necessary." BLM corrected its position late on December 26, but also assertedly indicated "that it would not be necessary to have someone go to the office that afternoon to pay the fee, but rather that Mr. Burke [appellant's attorney] should mail a check for Twenty * * * Dollars to the Bureau of Land Management." Appellant also asserts "[t]hat the check was mailed forthwith and was received by the Bureau of Land

Management on the following day." Appellee contends that timely payment of the filing fee is mandatory and that failure so to pay requires dismissal of an adverse claim. In the alternative appellee says a hearing is necessary to establish the facts. Before discussing those issues, we turn to a procedural contention made by appellee.

[1] Appellee asserts that the appeal must be dismissed because copies of the notice of appeal and statement of reasons were not served upon appellee's counsel, as required by the decision appealed from, but rather were served upon appellee company.

Appellee adverts to 43 CFR 4.22 (b) and 43 CFR 4.402 which read as follows:

(b) *Service generally.* A copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case. In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his client, and service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by rule, order, or regulation of an Appeals Board. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

§ 4.402. *Summary dismissal.*

An appeal to the Board [of Land Appeals] will be subject to summary dismissal by the Board for any of the following causes:

(a) If a statement of the reasons for the appeal is not included in the notice of appeal and is not filed within the time required;

(b) If the notice of appeal is not served upon adverse parties within the time required; and

(c) If the statement of reasons, if not contained in the notice of appeal, is not served upon adverse parties within the time required.

It is true, as asserted by appellee, that the regulations contemplate that the attorney for an adverse party, rather than the adverse party itself, be served with copies of pertinent documents. However, the regulations do *not* mandate that a failure to serve, in conformity with 43 CFR 4.22(b), necessarily requires summary dismissal of the appeal. Such failure renders the appeal *subject to summary dismissal*, a discretionary determination. *Tagala v. Gorsuch*, 411 F.2d 589, 590 (9th Cir. 1969); *Pressentin v. Seaton*, 284 F.2d 195, 199 (D.C. Cir. 1960). Appellee's answer to the statement of reasons for appeal reflects a full understanding of the crucial issues and we see no reason to invoke the harsh result.

Turning to the issue of the payment timely of the filing fees, we note that appellee states that the reasons advanced by appellant "consist entirely of assertions of fact."

[2] The Board has endeavored to ascertain the facts by its letter of August 6, 1974, to the BLM State Director for Wyoming. His response stated in pertinent portion as follows:

In response to your request dated August 6 concerning the Brown Land Company's allegations in its statement of reasons for appeal IBLA 74-211, W-

42392, W-42393, we submit the following statements:

1. On December 26, 1973, within the time limits for filing adverse claims in this matter, Adverse Claims were filed on behalf of Brown Land Company by its representative in the appropriate office in Cheyenne, Wyoming. Personnel of this office could not recollect the name of the individual who physically filed the claims.

2. Twenty dollars were tendered pursuant to 43 CFR Subpart 3871.1(d).

3. The tender was not accepted; personnel of this office stated that a filing fee was not necessary.

4. Upon receipt of the Adverse Claims documents to be filed and inquiry as to whether a filing fee was required, the receiving clerk stated that she thought a filing fee was required and turned to a superior in the room and inquired as to whether a filing fee was necessary.

5. The receiving clerk did inquire of a superior in the presence of the Brown Land Company's representative. Her superior stated that a filing fee was not necessary.

7. [sic] A call was received from a person identifying himself as Daniel M. Burke, Casper, who informed the clerk the regulations did require a filing fee be paid, that BLM personnel were mistaken in rejecting the tender earlier, and that he would call another friend in Cheyenne who would come immediately to the office and pay the required filing fee.

8. The telephone conversation transpired on December 26, 1973, before closing of the Bureau of Land Management Office and transpired within the time limits for filing an adverse claim in this matter.

9. After the regulations were researched at Mr. Burke's request and we acknowledged our error, Mr. Burke was informed that since it was our error the adverse claim would be considered filed as of the 26th day of December, 1973, and

that it would not be necessary to have someone go to the office that afternoon to pay the fee but rather that Mr. Burke should mail a check for twenty dollars to the Bureau of Land Management. The check was received by the BLM the following day.

10. Tender of the filing fees on December 26, 1973, and filing them December 27, 1973, does not satisfy the requirements of 43 CFR Subpart 3871.1(d), and the fees were not timely filed.

11 & 12. We agree that Mr. Burke was badly misled by Bureau employees and that, in fairness, his claims should be considered timely filed. In view of the involvement of a third party in the action at issue, however, we did not feel that we had the discretion to waive the literal requirement of 43 CFR 3871.1(d).

The State Director's letter fully supports appellant's contentions and appellee has not attempted to controvert the contents of the State Director's letter. In the circumstances, a hearing would serve no useful purpose. A tender of payment, erroneously refused by a Bureau of Land Management office, is sufficient to meet the requirements of payment as of the date tendered. Thereafter, actual payment must be made within a reasonable time. *H. E. Stuckenhoff*, 67 I.D. 285, 288 (1960). *Cf. James Milton Cann*, 16 IBLA 374 (1974).

[3] Appellee, in its response to appellant's statement of reasons, asserts that the "issues presented by the adverse claims concerned are not a proper subject for adverse proceedings and the adverse claims should be dismissed on the merits for that reason." Appellee thus takes the position, as it does in its letter of September 5, 1974, that

apart from any issue of procedural deficiencies, the adverse claims are not cognizable within the ambit of 30 U.S.C. §§ 29, 30 (1970). The ground asserted by appellant as its basis for adverse claims¹ is as follows:

II. The nature and extent of the interference or conflict is that Brown believes it is the owner or lessee of all of the surface affecting the captioned claims and, therefore, with respect to this matter, all right, title, interest and possession in, to and of said claims had by the Cleveland Cliffs Iron Company, the claimant herein, and hereinafter referred to as "Claimant", is had only through Brown pursuant to contract, evidenced by the documents attached hereto as "Exhibits B-1" through "B-3", which Exhibits are certified documents and are by this reference incorporated herein and made a part hereof, and which contract has been breached by Claimant, reverting to Brown all right, title, interest and possession had by Claimant in, to and of said claims; or, pursuant to said contract, all right, title, interest and possession in, to and of all claims is held by claimant in constructive trust for Brown's benefit.

We note that on January 25, 1974, appellant commenced suits, Civil No. 74-13 and Civil No. 74-14, in the United States District Court for the District of Wyoming against appellee.

Appellee argues in its answering brief on appeal as follows:

Adverse claim procedures only apply where one mineral claimant contests the right of another mineral claimant. It is

¹ Appellant's interest apparently stems from rights derived from patents issued under the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. §§ 291-301 (1970). Under 43 U.S.C. § 299 (1970), all minerals are reserved to the United States in all such conveyances.

some claim or holding adverse in interest to that which is claimed by the Applicant for patent. Its purpose is to initiate a contest to determine who is entitled to the possession of the ground in controversy, and to guide the Land Office in the issuance of patent. (2 *Am. Law of Mining* § 9.13).

The proper scope and subject matter of adverse proceedings has consistently been limited by the courts to those issues directly affecting the right to patent vis' a vis' truly conflicting claimants. Therefore, the claims of co-owners are not adverse claims for purposes of such proceedings. *Turner v. Sawyer*, 150 U.S. 578 (1893); *Thomas v. Elling*, 25 L.D. 495 (1897); *Estate of Bower* [sic] v. *Superior Perlite Mines, Inc.*, 81 I.D. 30, IBLA 72-411, GFS (Min) 14 IBLA 201 (1974). Similarly, the claims of a lienor against a debtor's claim to patent are not the appropriate subject for adverse claims proceedings. *Butte Hardware Co. v. Frank*, 25 Mont. 344, 65 P. 1 (1901). Nor need a party who, prior to publication, had himself gone through all the regular proceedings required to obtain a patent on the same lands, protest against a subsequent application to preserve his rights. *Steel v. Gold Lead Gold & Silver Mining Co.*, 18 Nev. 80, 1 P. 448 (1883).

In *Union Oil Co.*, 65 I.D. 245, 248-49 (1958), the Department discussed adverse claims as follows:

The Department has for many years held that an adverse claim must be filed only by rival mining claimants and that an oil and gas lessee does not fall into that category. In *Joseph E. McClory et al.*, 50 L.D. 623 (1924), an oil and gas permittee filed a protest against a mineral patent application, during the period of publication, which the local officers treated as adverse claim. The Commissioner of the General Land Office (now Director of the Bureau of Land Management) held that the protestant was

not asserting his claim under the United States mining laws and that therefore his protest could not be treated as an adverse claim under sections 2325 and 2326 of the Revised Statutes (30 U.S.C., 1952 ed., secs. 29 and 30). ***

Appellant does not claim to hold any mining claims conflicting with the claims in issue. We need not, however, for the purpose of the controversy, determine whether appellant's protests constitute "adverse claims" within the purview of the law. It is well settled that where judicial proceedings have been initiated in a court of competent jurisdiction based upon an asserted adverse claim, the Department may await the result of proceedings so begun before giving further consideration to the protest. *Thomas v. Elling*, 25 L.D. 495, 498 (1897).

In the circumstances, we deem it appropriate to suspend action on the cases pending the result of the judicial proceedings.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the cases remanded for appropriate consideration in the light of this decision.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

ANNE POINDEXTER LEWIS,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

**JEWELL RIDGE COAL
CORPORATION**

3 IBMA 376

Decided *October 29, 1974*

**OPINION BY ALTERNATE
ADMINISTRATIVE JUDGE
SCHELLENBERG**

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

Background

Appeal by the Mining Enforcement and Safety Administration from a decision by an Administrative Law Judge (Docket No. NORT 72-254-P) to the extent that no violations were found and no penalties assessed with respect to two violations cited in two Orders of Withdrawal issued pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed in part and remanded.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Generally

In a section 109(a) penalty proceeding the finding of a violation and assessment of a civil penalty are not contingent upon proof that the order of withdrawal in which a violation is cited was issued according to the enumerated unwarrantable failure elements of section 104(c) of the Act, and lack of such proof will not justify the failure to assess penalties where it is shown that a violation actually occurred.

APPEARANCES: W. Hugh O'Riordan, Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Raymond E. Davis, Esq., on behalf of appellee, Jewell Ridge Coal Corporation.

Orders of Withdrawal Nos. 1 CEB, 9/27/71 and 2 CEB, 9/27/71, citing violations of 30 CFR 75.301 and 75.603, respectively, were issued on an inspection of Jewell Ridge Coal Corporation's (Jewell Ridge) Laurel Fork No. 12 Mine on September, 27, 1971. At a hearing held in Arlington, Virginia, on June 27, 1973, the Mining Enforcement and Safety Administration (MESA) introduced evidence to prove the violations described in the orders. Jewell Ridge did not appear at the hearing. On May 9, 1974, the Administrative Law Judge (Judge) issued an initial decision finding no violations had been proved. This conclusion of the Judge was premised on the fact that MESA had not carried its burden of proof with respect to the necessary prerequisites upon which orders issued pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act (Act)¹ must be based. The Judge's rationale with respect to both orders was that MESA had failed to prove that the violations therein alleged: (1) could significantly and substantially contribute to the cause and effect of a mine health or safety hazard; (2) were the result of an unwarrantable fail-

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

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ure on the part of the operator to comply with the cited sections; and (3) were similar to violations which were the subjects of previous section 104(c)(1) orders of withdrawal. Consequently, the Judge concluded that no violations were proved and he assessed no penalties.

Both parties filed timely briefs.

Contentions of the Parties

MESA contends that the Judge improperly vacated the orders, that violations were proved, and that penalties must be assessed therefor. MESA argues that the Judge erred in concluding that the conditions necessary to support the issuance of a 104(c)(2) order were necessary elements of a finding of violation of a mandatory standard.

Jewell Ridge supports the decision and contends that if a penalty is mandatory for a violation of a mandatory health or safety standard regardless of the choice of citation made by MESA “* * * then there would be no practical difference between a section 104(b) notice and a section 104(c) notice or order, other than the severity of the result in the case of a section 104(c) order.”

Issue Presented

Whether the Judge's invalidation of alleged violations and failure to assess penalties for such violations, if proved, was proper.

Discussion

MESA poses two issues to the Board in this appeal. The first issue as set forth in its brief, to wit:

“Whether an Administrative Law Judge has the power or authority to vacate an Order of Withdrawal in a Civil Penalty Proceeding,” is summarily rejected, since the premise therefor is unsupported by the record. Nowhere in his decision did the Administrative Law Judge vacate the orders in question. As the brief on behalf of Jewell Ridge correctly points out the thrust of the Administrative Law Judge's decision was not the vacation of any order but a dismissal of the violation cited therein for insufficient evidence of the offense alleged.

We turn now to the issue presented by this appeal. This Board has on previous occasions held that penalties are required to be assessed for violations even though such violations are cited in withdrawal orders issued pursuant to 104(a) of the Act (imminent danger), and that, except insofar as an order of withdrawal may reflect upon the gravity of conditions or practices, the validity or invalidity of such order will not affect the subsequent assessment of penalties.² In the instant case, alleged violations of the mandatory standards were cited in two separate orders of withdrawal issued pursuant to section 104(c)(2) of the Act (unwarrantable failure). Any notice or order issued pursuant to section 104(c) must be premised upon and cite an alleged violation of a mandatory standard. The phrase “unwarrantable failure of the operator to comply,” infers

² Eastern Associated Coal Corp., 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972).

the necessary prerequisite of the occurrence of a violation. There can be no unwarrantable failure to comply unless related to a mandatory standard. The decision before us raises the question of whether an *alleged violation* cited in a 104(c) (2) order has different elements of proof than an alleged violation cited in a 104(b) notice or a 104(a) order of withdrawal. We think not. The so-called elements of 104(c) are not in our view prerequisites to a finding of violation, but are conditions superimposed upon an initial finding of violation of a mandatory standard designed to activate the withdrawal sanctions of that section of the Act. By its very sequence, section 104(c) supports this proposition. The opening phrase of 104(c)(1), in pertinent part, is identical to that of 104(b), to wit: "If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard * * *." Next following in sequence are the requirements that (1) "if he (inspector) also finds * * * conditions * * * do not cause imminent danger" and (2) "could * * * contribute to the cause and the effect of a mine safety or health hazard" and (3) "* * * he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards he shall include such finding in any notice given to the operator under this Act." The Board has held in *Eastern Associated Coal*

Corp., 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), that such requirements are encompassed in the term "similar" and are required to be found with respect to orders issued pursuant to section 104(c)(2). Thus, we conclude that a finding of violation must be the initial determination independent of any other requirement of 104(c), and that the superimposed conditions of 104(c) relate solely to the withdrawal sanctions of that section and do not affect the operator's liability for a civil penalty where a violation has occurred.

It follows that for the purpose determining whether a violation has occurred in a section 109 proceeding, there is no practical difference between a section 104(b) notice and a section 104(c)(2) order. Failure to prove unwarrantability criteria of section 104(c) in a penalty proceeding will not invalidate otherwise proved violations or justify failure to assess penalties therefor in a section 109 proceeding.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(1)), the decision IS REVERSED in pertinent part and the case IS REMANDED for a supplemental decision consistent with this opinion.

HOWARD J. SCHELLENBERG, Jr.,
Alternate Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

October 30, 1974

**IN THE MATTER OF EASTERN
ASSOCIATED COAL CORP.
(KEYSTONE NO. 1 MINE)**

3 IBMA 383

Decided *October 30, 1974*

Application for Review.

**1. Federal Coal Mine Health and
Safety Act of 1969: Unwarrantable
Failure: Closure Orders: Inspections**

Since 30 CFR 45.2-1 was not republished in the *Federal Register* after enactment of the Federal Coal Mine Health and Safety Act of 1969 pursuant to section 101(j) of that Act, such regulation lost all force and effect by virtue of the repeal of the Federal Coal Mine Safety Act of 1952 which such regulation purported to interpret. 30 U.S.C. § 811(j) (1970).

**MEMORANDUM OPINION
AND ORDER UPON
RECONSIDERATION**

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

Eastern Associated Coal Corporation (Eastern) has filed a timely petition seeking reconsideration of a decision by the Board in the above-captioned appeal. We issued our opinion and order in this case on September 20, 1974, and, for the reasons stated therein, we upheld the validity of a closure order which was issued by a federal coal mine inspector pursuant to section 104(c) (2) of the Federal Coal Mine Health and Safety Act of 1969.¹

3 IBMA 331, 81 I.D. 567, 1974 OSHD par. 18,706 (1974). Eastern presents several objections to our decision and we deal with them *seriatim*. We see no need for any further briefs or oral argument, as Eastern has requested.

[1] First, Eastern challenges our conclusion that liability to further 104(c) (2) closure orders, after issuance of an initial one, may only be lifted when a complete inspection, as distinguished from a spot inspection, subsequently reveals no similar violations. Eastern's argument is based upon a regulation declaring when an inspection is completed and does not differentiate between spot and complete inspections.²

The regulation cited to us by Eastern was promulgated pursuant to the Federal Coal Mine Safety Act of 1952 which was repealed by section 509 of the Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 803). The continuing effectiveness of 30 CFR 45.2-1, as Eastern recognizes, is entirely dependent upon section 101(j) of the 1969 Act which requires republication in the *Federal Register* on or after the date of enactment which was De-

² Section 45.2-1 of 30 CFR provides that:

"An inspection shall be considered as completed when the inspector reaches the surface of the mine during or after the shift on which he first entered the mine. When the inspector goes in the mine on a shift other than the one on which he came out of the mine the work he performs on the later shift shall be considered another inspection."

¹ 83 Stat. 751, 30 U.S.C. § 814(c) (1970).

ember 30, 1969.³ The regulation now before us was published at 34 F.R. 1134 on January 24, 1969, prior to the date of enactment of the 1969 Act, and to the best of our knowledge has not been republished since then. Accordingly, it is the opinion of the Board that 30 CFR 45.2-1 is without the force and effect of law and is not binding upon the Department.

In addition, we are of the opinion that even if the regulation were still effective, it would have no impact upon our decision. It purports only to declare when an inspection by an inspector shall be considered as completed in order to differentiate it from what may be considered to be another inspection for some purpose germane to the 1952 Act but not to the 1969 Act. Under our interpretation, as set forth in the opinion of September 20, 1974, several *completed* partial or *completed* spot inspections of a mine may be required to constitute a "complete inspection" of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2).

Therefore, we reject entirely Eastern's argument that such defunct regulation has any appli-

cation whatever to the term "inspection" as used in section 104(c) of the Act.

A second objection by Eastern concerns our earlier opinions in *Eastern Associated Coal Corp.*⁴ and *Freeman Coal Mining Corp.*⁵ which dealt with the validity of imminent danger closure orders that were issued pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a) (1970). Eastern argues that we have not sufficiently distinguished the terms "violation," "imminent danger," and "unwarrantable failure." This contention ignores the painstaking analytical effort by the Board in its opinion in the case at hand to delineate and apply the elements of a 104(c) charge, apart from the fact of violation. Moreover, Eastern has failed to appreciate that it is the unique characteristic of imminence which distinguishes those conditions or practices, reasonably posing a serious threat of bodily harm or death, which are subject to a 104(a) rather a 104(c) closure order. *Freeman Coal Mining Corp.*, *supra*, 2 IBMA at 212; *Eastern Associated Coal Corp.*, *supra*, 3 IBMA at 348, 354. Therefore, Eastern's second objection to the Board's decision is, like the first, without merit.

³ Section 101(j) provides as follows:

"All interpretations, regulations, and instructions of the Secretary or the Director of the Bureau of Mines, in effect on the date of enactment of this Act and not inconsistent with any provision of this Act, shall be published in the Federal Register and shall continue in effect until modified or superseded in accordance with the provisions of this Act."

⁴ 2 IBMA 128, 80 I.D. 400, 1971-1973 OSHD par. 16,187 (1973), *aff'd sub nom. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974).

⁵ 2 IBMA 197, 80 I.D. 610, 1973-1974 OSHD par. 16,567 (1973).

October 30, 1974

A third source of objections submitted by Eastern concerns the Board's omission of any discussion of the frequency with which MESA must make a complete inspection, of the maximum duration of a complete inspection, and of the alleged possibility of unending liability to 104(c)(2) closures without recourse for an operator. These specific issues were not raised prior to the filing of the instant petition for reconsideration and they assume facts concerning MESA inspection practices not present in the record before us. In our decision in this case, we did not purport to deal with each and every outstanding question concerning the administration of section 104(c) of the Act. The resolution of these as yet unanswered questions must await presentation by an appropriate case record so we may be assured of a concrete factual underpinning which we believe will avoid purely

advisory opinion and will minimize the chances for error.

The other objections to our decision submitted by Eastern, we deem to be without merit and too insubstantial to require discussion.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Board, rendered September 20, 1974, in the above-captioned appeal upon reconsideration IS REAFFIRMED.

DAVID DOANE,
Acting Chief Administrative Judge.

JAMES RICHARDS,
Ex-Officio Member of the Board.
Director, Office of Hearings and Appeals.

ADOLPH T. GRAY

17 IBLA 410

Decided November 1, 1974

Appeal from decision AA-3030 of Alaska State Office, Bureau of Land Management, rejecting in part an application to purchase a trade and manufacturing site.

Affirmed.

1. Alaska: Trade and Manufacturing Sites

Land is not occupied under 43 U.S.C. § 687(a) (1970) and 43 CFR 2562.3(d) (1) by use of the air space over it for the trajectory of bullets.

2. Alaska: Trade and Manufacturing Sites

Under 43 U.S.C. § 687(a) (1970) and 43 CFR 2562.3(d) (1), where there is no dispute as to the facts, the *pro tanto* rejection of an application to purchase a trade and manufacturing site will be affirmed to the extent that the application includes a large peripheral safety zone in connection with a rifle range and an archery range, and fails to show substantial improvements on, or active use of the rejected area.

APPEARANCES: Adolph T. Gray, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Adolph T. Gray appeals from that portion of a decision of the Alaska State Office, Bureau of Land

Management, dated March 21, 1974, which rejected 70 acres of land requested in his application to purchase a trade and manufacturing site filed pursuant to the Act of May 14, 1898, *as amended*, 43 U.S.C. § 687(a) (1970). This acreage was rejected because there was no evidence that it was used or occupied for the purpose of trade, manufacture or other productive industry as required by the Act. The decision approved the application as to the other five acres requested.

The site consisting of approximately 75 acres of unsurveyed land is located on the north side of Jack Lake in sections 34 and 35, T. 9 N., R. 11 E., Copper River Meridian.

In his application to purchase filed on July 13, 1973, appellant listed improvements valued at \$3500: log cabin, attached frame building 28' x 20', frame privy 4' x 5', rifle range, archery range, boat dock. Appellant stated under item 8c:

Approximately 5 acres are covered by these improvements.

Appellant affirmed that the land is used and occupied for a wilderness camp for boys and girls.

In its decision, the State Office referred to a field examination of the site which showed that appellant had placed certain improvements upon a portion of the land covered by the claim, had used and occupied a portion of the land, and had conducted a business enterprise on

81 I.D. No. 11

the lands, as required by the trade and manufacturing site law and regulations issued thereunder. The decision cites section 10 of the Act which provides in part:

Any citizen * * * in the possession of and *occupying* public lands in Alaska * * * may * * * purchase one claim * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * *. (Italics added.)

The decision also quoted from Departmental regulation 43 CFR 2562.3(d)(1). In part, the said regulation requires that the application to purchase show:

* * * [T]he land is actually *used* and *occupied* for the purpose of trade, manufacture or other productive industry * * * and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. * * * (Italics added.)

The State Office held that the applicant can obtain title to only so much of the land in his claim as it actually occupied by the improvements and used in his business, citing *Golden Valley Electric Association*, 8 IBLA 386 (1972).

The State Office concluded that appellant did construct improvements on a five-acre portion of his claim and is conducting a business venture sufficient to warrant patent of that portion. As for the remaining 70 acres, the State Office found no evidence of past or current use or occupancy for the purpose of trade, manufacture or other productive industry and therefore rejected the application for that acreage.

Appellant asserts that this decision is erroneous for the following reasons:

(a) since the 5 acres approved will not adequately provide for the announced riflery and archery program outlined in the camp brochure (enclosed)

(b) and a rifle range is indicated on the drawing submitted with other proofs with the application to purchase

(c) and a rifle range has been in use and a shooting table-rest constructed and installed for the purpose east of the approved east boundary

(d) and that regulation CFR 2562.3(d)(1) states in part

* * * and that *it embraces the applicant's improvements and is needed in the prosecution of the enterprise* * * *.

[1, 2] The question on appeal is whether the 70 acres rejected in the State Office decision are used and occupied for the purpose of trade, manufacture or other productive industry. The State Office field report stated that "[t]he improvements were found to cover an area not exceeding five acres in extent," as was admitted by appellant in his application. The sketch attached to the application only roughly indicated a rifle range and an archery range, and did not show the size of either. It has been held that a particular 10 acre portion of a trade or manufacturing site need not contain substantial improvements provided the land is actively used in the conduct of the business. *Lloyd Schade*, 12 IBLA 316 (1973). Appellant herein seeks a nonactive use of a 70-acre unimproved peripheral area, apparently in order to provide large safety zones in connection with rifle and

archery ranges.¹ It has been properly held that under the Act land is not occupied by use of the air space over it for the trajectory of bullets. *Elmer H. Houger*, Fairbanks 014507 (June 24, 1964). We hold that appellant has not alleged the facts to show substantial improvements on, an active use of, or occupancy of more than the 5 acres granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS,
Administrative Judge.

We concur:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

**ADMINISTRATIVE APPEAL OF
EMIL HALIEWICZ D/B/A SKY-
LINE LOGGING AND EQUIPMENT
SALES v. MAKAH INDIAN TRIBE
AND COMMISSIONER, BUREAU
OF INDIAN AFFAIRS**

3 IBIA 136

Decided November 7, 1974

Appeal from administrative order retaining bid deposit upon failure to meet requirements of bid advertis-

ment. Skyline No. 1 Logging Unit, Makah Reservation, Washington.

Docketed and Affirmed.

**1. Indian Lands: Forestry: Timber
Sales Contracts: Bid Conditions**

Failure of a successful bidder to meet the conditions included in the bid advertisement within time limitations renders the bid deposit subject to retention as liquidated damages pursuant to the advertisement and the provisions of 25 CFR 141.10(d).

APPEARANCES: For the appellant, B. Franklin Heuston and the firm of Bean, Gentry and Rathbone; for the Makah Tribe, the firm of Ziontz, Pirtle, Morisset and Ernstoff.

NOTICE, ORDER AND

OPINION BY

CHIEF ADMINISTRATIVE

JUDGE McKEE

*INTERIOR BOARD OF
INDIAN APPEALS*

Two separate notices of appeal were timely filed in this matter with the Area Director, Portland, on May 31, 1974, by Emil Haliewicz d/b/a Skyline Logging and Equipment Sales:

One notice of appeal filed in appellant's behalf by B. Franklin Heuston, attorney of Shelton, Washington, is directed to the decision dated May 16, 1974, by the Area Director in a letter to the appellant over the signature of the

¹ See *Schade*, *supra*, at 319.

Forest Manager's ruling that a \$21,000 bid deposit paid by appellant was declared to be liquidated damages and was to be retained as such. In this notice appellant requests a hearing; and

One notice of appeal filed in appellant's behalf by the law firm of Bean, Gentry and Rathbone of Olympia, Washington, is directed to the action of April 25, 1974, by the Makah Tribal Council rejecting appellant's request for a time extension in which to complete and file the contract documents for a sale of tribal timber, and further directing retention of the appellant's liquidated damage deposit of \$21,000 filed with his bid.

On June 4, 1974, the Makah Tribe appearing by the law firm of Zientz, Pirtle, Morisset & Ernstoff of Seattle, Washington, filed a motion to dismiss the appeal from the tribal action alleging that the Area Director had no jurisdiction to entertain the appeal under 25 CFR 2.2.

The appeal record was transmitted to the Commissioner by the Area Director's memorandum of June 11, 1974. The Commissioner in turn referred the appeal notices and the administrative record to this Board where they were received October 1, 1974.

By delegation of authority issued December 14, 1973, amending 211 DM 13.7, the Secretary directed that appeals from the administrative decisions of the Bureau of Indian Affairs should be decided by the Board of Indian Appeals.

NOTICE IS HEREBY GIVEN

that the appeals are hereby docketed before the Board on this date under the above number. The Makah Indian Tribe is considered the principal party in interest and the Commissioner represents the United States.

The facts are these. On February 26, 1974, the appellant, Emil Haliewicz d/b/a Skyline Logging and Equipment Sales, was the successful bidder at the advertised sale of Skyline No. 1 Logging Unit on the Makah Indian Reservation. The advertisement for the sale required a deposit of \$21,000 with the bid, which the appellant furnished, to be applied to the sale price of timber to be cut from the unit at a later date or, if no contract was signed by the high bidder, it was to be retained as liquidated damages. The advertisement required further that the signed contract and a satisfactory bond in the amount of \$35,000 should be furnished by the successful bidder within 30 days of the acceptance of his bid.

On March 8, 1974, the Forest Manager notified appellant by letter that his bid had been accepted by the Area Director, on March 4, 1974, and he stated, "In accordance with the advertisement, you have 30 days from the date of acceptance to execute the contract and furnish a satisfactory bond in the amount of \$35,000." On April 3, 1974, the 30th day after acceptance of the bid the appellant requested a two- or three-week extension, and the request was forwarded by the Superintendent to the Area Director with a recom-

mendation that it be granted. Without any notice to the appellant, on April 8 the Area Director agreed to an extension to April 24 but instructed the Superintendent to contact the Tribe in order to obtain its concurrence. The Tribal Council met on April 25 and adopted a resolution whereby it refused to agree to any extension of time and demanded the forfeiture of the \$21,000 bid deposit pursuant to the provisions of the advertisement for sale.

On May 16 the Superintendent advised the appellant according to the instructions from the Area Director that the bid was canceled and the bid deposit money would be retained as liquidated damages. He further advised the appellant of his rights of appeal. The appeal was filed accordingly and prosecuted to this point pursuant to the regulations.

There is nothing in the record or in the appellant's petition attacking the Area Director's decision to forfeit the \$21,000. He alleges hardship and sets forth reasons for his default, none of which are relevant, *i.e.*, he was named as defendant in a collateral law suit and his assets were frozen by a writ of attachment. The appellant makes no allegation that he has any evidence that he has met the requirements of the advertisement for sale under which he submitted his bid and his bid deposit. He does not allege any mistake in his bid nor did he ever demand return of his deposit prior to notice of forfeiture.

It is true that the record reveals that he requested extensions of time in which to complete the contract papers and to supply the necessary \$35,000 bond, but the greatest extension of time even considered at all by the Bureau of Indian Affairs was to the date of April 24, 1974. The Tribe never agreed to any extension. By his own statements the appellant was in no position on April 24 or at any date earlier than May 7, 1974, to fully perform the requirements of the advertisement. He made no tender of performance between May 7 and the date of May 16, when the Area Director terminated the negotiations.

It is noted that the conditions of the advertisement providing for the disposition of deposits are in full compliance with 25 CFR 141.10(d) which reads:

The deposit of the successful bidder will be retained as liquidated damages if the bidder does not execute the contract, and furnish the performance bond required by § 141.14, within the time stipulated in the advertisement of timber sale.

It is true that in the appellant's petition of May 29, 1974, which is signed by both of his attorneys, B. Franklin Heuston and Fred R. Gentry, appellant alleges he was on such date in a position to perform the requirements of the bid advertisement, and he offers, in addition to performance of the contract, to make allowances out of the \$21,000 for damages which the Tribe may have suffered. Nothing in this decision shall be taken as a bar to further negotiations which may be initiated if

the parties are in a position to reach a meeting of the minds. The unit was readvertised for sale but no bids were received at the bid opening on July 2, 1974, and the unit remains unsold and unproductive.

A finding is made that by the appellant's own admissions he was in default in performance of the terms of the bid advertisement on and for some days prior to issuance of the notice and order of cancellation. The reasons given may be taken at face value as true, but they do not present a legal ground to excuse default. Thus no controverted issue of a material fact is presented, and a fact-finding hearing would serve no purpose. The appellant's request for hearing is refused.

The Tribe's motion to dismiss the appeal as being beyond the jurisdiction of the Area Director becomes a moot issue in view of the decision reached herein on other grounds. Therefore, no ruling is made disposing of the Tribe's motion to dismiss.

[1] A finding is made that the appellant failed to perform or to tender performance within the time specified; that in contracts of this nature time is of the essence; that the action of the Area Director in retaining the \$21,000 bid deposit was within the provisions of the regulations; there is no legal ground presented by the appellant for setting aside the requirements of the invitation to bid as published; and that this appeal should be dismissed.

NOW THEREFORE, by virtue

of the authority delegated to the Board of Indian Appeals by the Secretary of Interior, 43 CFR 4.1, it is hereby ORDERED: the appeal of Emil Haliewicz shall be, and the same is hereby, DISMISSED.

This decision is final for the Department.

DAVID J. McKEE,
Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

CONSOLIDATION COAL COMPANY

3 IBMA 390

Decided November 8, 1974

Appeal by Consolidation Coal Company (Consolidation) from a decision by an Administrative Law Judge (Docket No. BARB 74-338), dated March 8, 1974, dismissing an Application for Review, filed by Consolidation, of a Notice of Violation issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969.¹

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

Hoist vehicles which haul supplies and require a tractor operator to be on board fall under the purview of 30 CFR 75.1400, which requires overspeed, overwind, and automatic stop controls on all hoists used to transport persons.

¹ 30 U.S.C. §§ 801-960 (1970).

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2. Federal Coal Mine Health and Safety Act of 1969: Generally

The term "persons" includes the singular "person" as well as the plural "persons" when used in section 314(a) of the Act (30 CFR 75.1400) to determine when overspeed, overwind, and automatic stop controls are required on hoists.

APPEARANCES: Philip C. Wolf, Esq., for appellant, Consolidation Coal Company; Richard V. Backley, Esq., Assistant Solicitor, and John P. McGeehan, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ALTERNATE ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

[1] Having reviewed the record and considered the briefs of both parties, this Board finds that Consolidation Coal Company (Consolidation) has not demonstrated any reason why the findings of fact, conclusions of law, and decision of the Administrative Law Judge (Judge) should not be affirmed. We believe the Judge's decision is well supported by the evidence presented and accurately reflects the Board's view on this issue. We, therefore, incorporate it herein as reflective of our views.²

² Judge's Decision follows 3 IBMA 393, at 51 I.D. 638 (1974).

[2] In further support of the Judge's conclusion that the term "persons" used in section 314(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act) (30 CFR 75.1400) includes the singular "person" as well as the plural "persons," we note that 1 U.S.C. § 1 (1970) states in part, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—* * * words importing the plural include the singular;" We believe that the context of section 314 (a) of the Act and 30 CFR 75.1400 does not indicate that the singular "person" was to be excluded from its coverage since it is also our view that the Congress intended to protect all miners, both individually and collectively, from all types of danger, and, thus, includes the singular "person" as well as the plural "persons."

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

March 12, 1974

CONSOLIDATION COAL COMPANY

Application for Review.

Docket No. BARB 74-338.

Matthews Mine, Notice of Violation No. 2 KTH, June 22, 1972.

AMENDMENT TO DECISION

The second paragraph on the first page of the Decision entered on March 8, 1974, is hereby AMENDED by adding the following sentences at the end of said paragraph:

The above finding of waiver under 5 U.S.C. 557(c) is based upon the Judge's understanding at the conclusion of the prehearing conference, just before the hearing, that the parties desired a decision after oral argument without written submissions of proposed findings and conclusions. The opportunity to propose findings and conclusions before this written Decision was also extended, but declined by the parties.

WILLIAM FAUVER,
Administrative Law Judge.

March 8, 1974

DECISION

This proceeding was brought by Consolidation Coal Company pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 753, Public Law 91-173, to review a Notice of Violation issued under section 104(b) of the Act. A hearing on the merits was held on February 27,

1974, at Ballston Tower #3, 4015 Wilson Boulevard, Arlington, Virginia, James T. Hemphill, Esq., represented the applicant, Consolidation Coal Company, and John P. McGeehan, Esq., represented the Mining Enforcement and Safety Administration (MESA).

After hearing and considering the evidence, the arguments of counsel, and the record as a whole, the Administrative Law Judge offered both parties the opportunity to present proposed findings of fact and conclusions of law as provided for by 5 U.S.C. § 557(c). Counsel having waived this opportunity, and oral opinion was entered at the close of the hearing. This decision is entered pursuant to the oral opinion and pursuant to section 105 of the Act and section 4.593 of the Secretary's Regulations, 43 CFR 4.593.

The basic issue in this case is whether the following mandatory safety standard (§ 75.1400, Title 30, Code of Federal Regulations, being a verbatim duplication of section 314(a) of the Act) is applicable to the hoisting conditions cited at Applicant's Matthews Mine.

§ 75.1400 Hoisting equipment; general. Every hoist used to transport persons at a coal mine shall be equipped with overspeed, overwind, and automatic stop controls. Every hoist-handling platforms, cages or other devices used to transport persons shall be equipped with brakes capable of stopping the fully loaded platform, cage, or other device; with hoisting cable adequately strong to sustain the fully loaded platform, cage, or other device; and have a proper margin of safety. Cages, platforms, or other devices which

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are used to transport persons in shafts and slopes shall be equipped with safety catches or other no less effective devices approved by the Secretary that act quickly and effectively in an emergency, and such catches shall be tested at least once every 2 months. Hoisting equipment, including automatic elevators, that is used to transport persons shall be examined daily. Where persons are transported into, or out of, a coal mine by hoists, a qualified hoisting engineer shall be on duty while any person is underground, except that no such engineer shall be required for automatically operated cages, platforms, or elevators.

The facts of the case are not in dispute. Resolution of the issue is, therefore, dependent upon legal interpretation of the safety standard involved.

HISTORY

On June 22, 1972, Inspector Kenneth T. Howard issued a Notice of Violation to Ralph Wilkerson, Safety Director for Consolidation Coal Company's Matthews Mine located at Tackett Creek, Claiborne County, Tennessee. The notice cited a violation of 30 CFR 75.1400, alleging that:

The hoists used at the #1, #2, and #3 slopes for transporting of material trips, which must be guided by man operated battery tractors were not equipped with overspeed, overwind and automatic stop controls and the ropes used did not have a proper margin of safety as specified in the American National Standards Institute "Specifications For the Use of Wire Ropes for Mines," M 11.1-1960.

The notice indicated a lack of imminent danger and called for abatement of the alleged violation by

July 24, 1972. That deadline was extended by numerous written notices until December 17, 1973. MESA thereafter granted two additional extensions; the first expired on December 31, 1973, and the second is to expire this week.

On December 19, 1973, applicant filed an Application for Review pursuant to the requirements of section 105(a) of the Act, alleging that no violation had in fact occurred.

On December 28, 1973, MESA filed an Answer to the Application for Review, asserting that the notice had been properly issued, denying all material allegations of the Application for Review, and moving for dismissal of the Application on the ground that it had not been filed within the 30-day period required by section 105(a) of the Act.

MESA's Motion to Dismiss was denied on January 21, 1974, on the grounds that "a notice extending the abatement time in a notice of violation" constitutes a "modification" of the notice and, as such, becomes a notice itself, extending the 30-day filing period.

Having fully considered the testimony, documentary evidence, and the contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following facts:

FINDINGS OF FACT

1. Applicant's Matthews Mine, located in Claiborne County, Ten-

nessee, is an underground, slope, bituminous coal mine which employs about 300 miners.

2. The Notice of Violation at issue involves the hoisting system used in three of the slope entries of the mine. The relevant facts concerning the slope conditions, hoisting equipment, and hoisting procedures for each slope are the same and common to each of the three slopes:

a. The slope entries are 14 feet wide, and descend into the mine on an 18° grade. Slope #1 extends over 200 feet, Slope #2 over 600 feet, and Slope #3 over 800 feet, before ending at the mine conveyor belt system.

b. The production crews enter and leave the mine through the three slopes, using an elevated catwalk going in and an escalator belt coming out of each slope. The escalator is attached to the catwalk frame, which is about six feet wide and has an overhead clearance of about one foot above the height of the hoisting vehicles which ride on the slope roadway.

c. The supply hoisting system at each slope involves a surface hoist, a hoist engineer, a gondola coupled to a tractor (both rubber-tired), a tractor operator, and one or two supply workers who load and unload the gondola or otherwise assist the hoist operation, but only the tractor operator rides on the hoist vehicles.

1. The hoist cable (wire rope) connects the hoist to the vehicle on the outby side of the coupled pair of

vehicles. The tractor usually operates in by the gondola, but may operate on the outby side as well.

2. The gondola and tractor are coupled by a drop pin, similar to that used on railroad cars. Safety chains are also used to connect the tractor to the gondola.

3. The tractor (which weighs about four tons) is operated by one man and is necessary to steer the gondola and to give it additional braking power. For most loads, the tractor is not capable of braking the gondola without the power of the hoist cable. In practice, the coupled vehicles depend on the hoist cable to move up or down the slope. For most loads, a severance of the hoist cable would result in a runaway trip.

4. In two of the slopes the catwalk terminates approximately 100 feet before the end of the slope. Hence, the miners traveling beyond the catwalk in these slope entries could be struck by a runaway trip. In all three slopes, a runaway trip could severely injure or kill miners by crashing into the catwalk's vertical supports.

5. The hoist equipment for each slope does not have overspeed, overwind, or automatic stop controls as prescribed in 30 CFR 75.1400.

6. The primary purpose of the hoist system in each slope is to transport supplies and equipment into and out of the mine. The maximum weight hoisted under normal conditions is about ten tons (the tractor, the gondola, and cargo). Heavy equipment is also hoisted in and out of the slopes by this

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method. Loads of up to 50 tons (heavy mining equipment) have entered the mine using these hoists. Additional wire ropes are used in these situations to supplement the existing system.

d. The mine operates a day shift and an evening shift for production. Each supply hoist (*i.e.*, at each slope) makes three or four round trips during the day shift. An unspecified number of trips is made during the evening shift.

e. At least three hoisting accidents have occurred at Matthews Mine in approximately the past year. Two were due to coupling failures, one to a cable break. Each accident involved a runaway tractor and gondola. One tractor operator was seriously injured when his vehicle separated from the wire rope and collided with the roof cribbing about 400 feet further down the slope.

f. The installation of the safety equipment specified in 75.1400 (*i.e.*, overspeed, overwind, and automatic stop controls) on applicant's hoists would materially reduce the risk of hoist accidents at applicant's mine, including the risk of accidents of the types described above.

g. At the time of the issuance of the Notice of Violation, the hoisting cable did not meet the applicable margin of safety factor for the load limits involved. The mine inspector testified that the margin of safety for the wire ropes has since been corrected by reducing the load limits for hoisting at each slope.

h. Considering that a period of almost two years has elapsed since the original Notice of Violation, the evidence affirmatively shows that, by reasonable diligence, applicant could have obtained the safety equipment specified in 30 CFR 75.1400 in the time already allowed by MESA in its notice of violation and extensions thereof.

DISCUSSION

Disposition of this dispute necessarily rests with the interpretation of section 314(a) of the Act, which appears in the Secretary's Regulations as 75.1400. The parties agree that there is no factual dispute, but rely upon antithetical interpretations of the statute.

Applicant contends that section 314(a) is applicable only to hoists whose primary function is to transport "persons." The primary purpose of the cited hoists at Matthews Mine is the transporting of supplies and equipment into the mine, and, therefore, the regulation does not apply. In addition, applicant states that Section 314(a) requires "persons" (more than one) to be transported in order to sustain statutory jurisdiction. The three systems have only one tractor operator per hoist trip; hence, "persons" are not transported by the hoist systems.

MESA interprets the statute as covering all hoisting systems which involve "men and materials." The statutory language is to be liberally construed when the safety of miners is at issue. The legislative history

of the Act, states MESA, requires protection of each individual miner. The import of the Act was not only to protect against major, large-scale disasters, but also to eliminate single-miner accidents and fatalities. The legislative history of the Act, MESA argues, is illustrative of this interpretation. Section 2 of the Act sets the tone for the entire law:

Congress declares that—

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner.

MESA also contends that the legislative history indicates that the hoisting of “men and materials” must be considered collectively for the safety of persons. Its references to legislative history include:

From the Senate Report on section 314(a):

This standard should keep mine hoist accidents to a minimum and impart to mine management and workers the essential elements that enter into safe installation and maintenance of hoisting equipment. Hoisting of men and materials is an essential operation in many mines and has become so commonplace that some ignore day-to-day inspections or become lax in the operating phases. Where shaft or slope accidents have occurred because of failure of the hoisting equipment, they have been due almost always to lack of inspection and to lack of proper maintenance of the equipment.¹

¹ *Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, 91st Congress, 2nd Session, at 81 (1970).*

Comments of individual legislators:

Senator Javits:

Under the bill, strict new interim safety standards are established to cope with the danger of explosions such as the one which killed 78 miners in Farmington, W. Va., last November. The improved standards are not, however, limited to those directed at preventing “major disasters”; that is, those which threaten injury or death to five or more miners. All types of dangers are covered, * * * *

Representative Gaydos:

However, in the period of nearly a year since the Farmington disaster, while there has not been another major disaster, over 170 coal miners have been killed in mine accidents. This is well over two miners killed for each man who died in Consolidation Coal Co.’s No. 9 mine last November. And to prevent these non-disaster types of accident, the Federal Government does not now and never has had any power or responsibility to act.

These figures, in fact, are misleading. It is not that routine mine accidents are responsible for two deaths for every one killed in a major disaster. Major disasters account for only about 10 percent of the deaths and injuries in coal mines. The Federal law has never, even in its inadequate present form, been applicable to other than measures to prevent major disasters. And it has been too weak to accomplish even this limited objective.

Mr. Chairman, while we sit here discussing the details of this bill there is nothing to prevent another Farmington disaster. Nothing has been done to change the law since last November. And while we sit here men are being injured and killed by ones and twos in mines in every coal mining State in the Nation, and unless we act on H.R. 13950 nothing will be done to prevent such accidents.

² *Id.* at 221.

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H.R. 13950 offers the best hope we have to do something about coal mine disasters and accidents—all of them, major disasters and isolated rock falls.³

In weighing arguments in this case, I find that the legislative history establishes a strong concern of Congress for the safety of the individual coal miner, as well the Congressional intent that "the act be construed liberally when improved health or safety to miners will result."⁴

In 1969 Congress reevaluated the existing coal mine legislation and after extensive hearings and testimony passed the present Act. Numerous bills were considered. Various hoisting provisions were presented. The most notable difference in these bills was the inclusion of excavating and slope hoists in some, and the exclusion of them in others.⁵ None of the bills concerned itself with the question of whether one miner or more was required on a hoist to bring that hoist under the standard that eventually became section 314(a), although at least one bill indicated that *any* person underground would trigger the standard:

Sec. 311(a) Hoisting.—

(1) Where men are transported into or out of a mine or underground by hoists, or on surface inclines, a qualified hoisting engineer shall be on duty continuously at each hoist necessary to provide

immediate transportation while any person is underground.⁶

The final result of the hearings was section 314(a) of the Act. This section covered all hoists, granting no exceptions to excavating or slope hoists. Congress thus indicated a broadening of the safety requirements applicable to hoisting operations.

While the legislative history does not directly answer the issue in this case, the safety implications of the facts involved here do point to the same kind of dangers which the Congress had in mind in regulating "personnel" hoists.

The hoisting operation at the Matthews Mine is virtually unique in the industry, as slope hoists most commonly operate on track-haulage vehicles which do not require an operator. Thus, the typical supply hoist system for slope mines does not have personnel riding the hoist vehicles. For such systems, the additional safety requirements of section 314(a) do not apply so long as personnel do not ride on the vehicles. In the case at hand, however, serious dangers are presented for the tractor operator in the hoist operation, as evidenced by the history of hoist accidents at applicant's mine.

At the Matthews Mine, the hoisting operation is a continual supply artery into and out of the mine. The day shift at each slope has three to four round trips per day. Additional trips are made on the evening shift.

³ *Id.* at 907-908.

⁴ *Id.* at 1025.

⁵ *Hearings on Coal Mine Health and Safety before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Congress, 1st Session, Part I, at 7-447 (1969).*

⁶ *Id.* at 421.

At a minimum, there are eighteen times per day that a tractor operator rides a 5 to 10 ton hoist vehicle on a steep slope. Although the purpose of these trips is the haulage of supplies, the haulage trip cannot be performed without the presence of the tractor operator. As a practical result, the tractor operator cannot be separated from the primary function of the hoist since he is necessarily a part of that function. Therefore, he logically becomes equated to the primary purpose. The indispensable presence of tractor operators on these slope hoists imparts a functional quality to the hoists whereby they become hoists "used to transport persons."

The applicant's additional argument that the statute exempts hoists which carry one *person*, rather than *persons*, is not sustainable. The categorical use of *persons* in this statutory framework necessarily includes the singular *person*. The Federal Coal Mine Health and Safety Act of 1969 was forged to protect "its most important resource—the miner." To construe *persons* as exempting a single miner from coverage of the protection of the Act would frustrate the basic purpose of the Act.

It is therefore concluded that the provisions of section 314(a) of the Act (30 CFR 75.1400) apply to applicant's hoist operations at Slopes #1, #2, and #3.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction of

the parties and subject matter of this proceeding.

2. Applicant's Matthews Mine, at all times pertinent, has regularly produced coal for sale in interstate commerce or for sales affecting interstate commerce within the meaning of section 4 of the Act.

3. The required presence of an operator continuously riding on these slope hoists makes these hoists personnel hoists subject to the safety provisions in question. It is therefore held that applicant's hoists operating in Slopes #1, #2, and #3 of its Matthews Mine are "hoists used to transport persons" within the meaning of section 314(a) of the Act and 30 CFR 75.1400.

4. Applicant violated the provisions of 30 CFR 75.1400 as alleged in Notice of Violation 2 KTH, June 22, 1972.

5. Applicant has failed to meet its burden of proving that the time allowed for abatement in MESA's notices of violation and extensions herein is or has been unreasonable.

6. The record does not show what enforcement or administrative action MESA plans to take at the expiration of the latest notice of extension. That is, it is unknown whether a further extension will be granted by MESA, if so, how long, or whether MESA may decide to issue an order under section 104(b) of the Act rather than a further extension. It is therefore concluded that the issue of reasonableness of MESA's possible future notices or orders relating to the notice of violation herein is not ripe for decision.

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in this proceeding. The applicant will have the right under section 105(a)(1) of the Act to seek review of any such subsequent notice or order. Hence, it is concluded herein only that MESA's determinations of the time for abatement thus far of record have been reasonable.

ORDER

WHEREFORE IT IS ORDERED that MESA's Notice of Violation 2 KTH, June 22, 1972, and its extensions thereof are AFFIRMED and the Application for Review is DISMISSED.

WILLIAM FAUVER,
Administrative Law Judge.

APPEAL OF METAMETRICS CORPORATION

IBCA-1012-12-73

Decided November 12, 1974

Contract No. 14-12-801
Environmental Protection Agency.

Dismissed.

1. Rules of Practice: Appeals: Dismissal—Contracts: Disputes and Remedies: Appeals

Where a contractor failed to comply with an Order of the Board calling upon it to file a complaint within a certain period of time and thereafter did not show cause, as directed by a second Order, why its appeal should not be dismissed by reason of such failure, the appeal is dismissed for want of prosecution.

APPEARANCES: Mr. Helmuth Scherer, President, Metametrics Corporation, Annandale, Virginia, for appellant; Mr. Donnell L. Nantkes, Government Counsel Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE KIMBALL

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal under a cost-plus-fixed fee contract to provide a financial management plan to the Federal Water Pollution Control Administration. The contract was entered into with Management Assistance Corporation, appellant's "wholly-owned subsidiary," for \$136,053, which was ultimately increased by amendment to \$198,053.

Subsequently, the contract was terminated for convenience. The appellant has appealed from a decision of the Contracting Officer, dated October 19, 1973, which denied its claim for additional funds amounting to \$16,280.33 and held that appellant's subsidiary owed the Government \$2,147, as a result of overpayment.

On December 26, 1973, the Board issued a Notice of Docketing of the appeal which, after considerable difficulty, was eventually delivered to the appellant. Enclosed with the notice was a copy of the rules of the Board. Specifically called to the appellant's attention was sec. 4.107 of the rules, which provides for the

filing of a complaint within 30 days after receipt.

No complaint or any further communication was received from the appellant, however. Consequently, on June 7, 1974, the Board issued an Order extending *nunc pro tunc* the time within which the appellant might file a complaint. Upon the failure of the appellant once again to respond, the Board issued an Order on August 15, 1974, in which we specifically pointed out that the appeal had reached the stage where the Board was unable to proceed with disposition for reasons beyond its control. Accordingly, we directed the appellant to show cause within 30 days why the appeal should not be dismissed pursuant to sec. 4.126 of our rules (43 CFR 4.126). Sec. 4.126 provides as follows:

Sec. 4.126 Dismissal without prejudice.

In certain cases, appeals docketed before the Board reach a stage where the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. In any such case where the inability to take action upon the appeal has continued, or it appears that it will continue, for an inordinate length of time, the Board may in its discretion dismiss such appeal from its docket without prejudice to its restoration when the cause of delay has been removed, and when the parties have complied with conditions specified by the Board in its dismissal order.

After service of the Order to show cause could not be effected on the appellant in the usual fashion by certified mail, a copy was personally served upon its President on September 24, 1974. On October 22,

1974, or shortly before the expiration date of the 30-day period provided in the Order, he advised the Board by telephone that the appellant would not file a complaint.

As we had occasion to point out recently, Boards traditionally have applied procedural rules less stringently against contractors, such as this appellant, who are unrepresented by counsel.¹ We have been extremely lenient in this case. Almost one year has elapsed since the appeal was docketed and no further progress has been made. The case has remained in exactly the same posture that it was in 11 months ago.

[1] Even where no attorney appears for a contractor, the contractor ordinarily must take some further steps in pursuit of his claim beyond the filing of a notice of appeal. Under certain circumstances, upon the failure of an appellant to file a complaint, we are authorized by sec. 4.107(a) of our rules (43 CFR 4.107(a)),² to treat in lieu thereof the claim and appeal documents together as one, if in our opinion the issues are sufficiently defined. We do this in an effort to avoid disposition of appeals on technical grounds. The Board is unable to do so here, however, since the

¹ *Evergreen Engineering, Inc.*, IBCA-994-5-73, October 29, 1974), 81 I.D. 615, 74-2 BCA par. 10, 905.

² Sec. 4.107(a) reads in pertinent part:
" * * * Should the complaint not be received within 30 days, appellant's claim and appeal documents may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth his complaint * * *"

record does not lend itself to such treatment.³ I CONCUR:

The appellant has not shown an interest in prosecuting this appeal; nor has it expressed any intention of doing so in the future. On the contrary, its lack of zeal appears to demonstrate little faith in the rightness of its cause. And so, for an unreasonable length of time, the appeal has remained at status quo, a number on our docket, gathering dust in our files. And we, in turn, are unable to proceed with disposition on the merits as we would prefer.

The appellant has failed to go forward and the Board has reached the conclusion that the case has been abandoned. Reluctant though we may be to dismiss on procedural grounds where a contractor has no attorney, we have no other choice. The Board will not retain an appeal on its docket indefinitely.

By reason of the appellant's failure to prosecute, the appeal is hereby dismissed without prejudice pursuant to sec. 4.126 of our rules.⁴ Dismissal will become final should the appellant fail to file a complaint within 60 days after receipt of a copy of this decision.

SHERMAN P. KIMBALL,
Administrative Judge.

³ See *Barrett's Transfer & Storage, Inc.*, GSECA No. 3818 (October 31, 1973), 73-2 BCA par. 10,332; *Trans American Construction, Inc.*, ASBCA No. 15542 (September 23, 1971), 71-2 BCA par. 9087; *Power Engineering Company, Inc.*, ASBCA No. 13173 (January 15, 1971), 71-1 BCA par. 8684.

⁴ See *Henkle and Company*, IBCA-212, 66 I.D. 331 (1959), 59-2 BCA par. 2331.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPEAL OF WHITE PLAINS ELECTRICAL SUPPLY CO., INC.

IBCA-984-2-73

Decided November 12, 1974

Contract No. 14-06-503-1758,
Procurement of Interrupter Switches,
Rio Grande Project, Texas,
Bureau of Reclamation.

Sustained in Part.

1. Contracts: Construction and Operation: Modification of Contracts—Contracts: Performance or Default: Impossibility of Performance—Contracts: Disputes and Remedies: Termination for Default

A contractor's claim that it should be excused from performance due to a restrictive feature in a contract as awarded which caused impossibility of performance is denied where evidence shows that the contract as awarded was modified by mutual consent and the contractor had no valid excuse for failure to perform the modified contract so that a termination for default was proper.

2. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Damages: Actual Damages—Rules of Practice: Appeals: Burden of Proof

A contractor's appeal from imposition of excess costs on a reprocurement after a

termination for default is sustained where the Government failed to prove entitlement to excess costs when it chose to stand on evidence that it had awarded a reprourement contract at a higher price and had sent the defaulted contractor a bill for collection of the difference between the original contract price and the reprourement contract price. The Government's burden of proof when excess costs are challenged requires introduction of proof of performance and payment under the reprourement contract, which proof was not furnished by the Government.

APPEARANCES: Mr. Eugene Drexler, Attorney at Law, New York, New York, for appellant; Mr. Z. P. Shelton, Department Counsel, Amarillo, Texas, for the Government.

*OPINION BY
ADMINISTRATIVE JUDGE
PACKWOOD*

*INTERIOR BOARD OF
CONTRACT APPEALS*

This is an appeal from a termination for default and a subsequent assessment of excess costs. Appellant contends that it should be excused from performance because the contract was impossible to perform due to a restrictive feature in the original solicitation and in the contract which resulted from appellant's low bid in response to the solicitation. The appellant also asks to be excused from liability for excess costs.

The Bureau of Reclamation awarded Contract No. 14-06-503-1758 to appellant on June 14, 1968. The contract called for delivery of two motor operated load interrupter

switches and supporting structures within one hundred fifty days after receipt of notice of award.¹ The total contract price was \$10,700 for the items to be furnished. The contract was awarded on the basis of appellant's offer to furnish interrupters from the Joslyn Manufacturing Company which utilized vacuum modules. The feature in the solicitation which appellant now contends is restrictive is a drawing of a Joslyn interrupter containing four vacuum modules which was shown mounted on a tower in Drawing 24-508-1011 which was attached to the solicitation. The specifications contained no express requirement for a vacuum-type interrupter but made specific provision for a gas operated interrupter.

After lengthy and fruitless attempts to obtain the Joslyn interrupter, appellant advised the Government on June 3, 1969, that it was unable to do so. It offered, instead, to furnish Turner Electric interrupters at a reduction in unit price of \$120 per switch and requested a ninety day extension of the delivery schedule.² On December 11, 1969, the Government accepted appellant's offer to furnish the Turner interrupters.³

On April 7, 1970, appellant wrote to the Project Superintendent for the Bureau of Reclamation: "Please be advised that we are not able to complete this contract due to the in-

¹ Exhibit No. 7, Appeal File. All references herein to numbered exhibits are to those in the appeal file.

² Exhibit No. 35.

³ Exhibit No. 39.

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ability of our supplier, American Nucletron Corp., to procure the necessary parts and engineering for this highly technical equipment.”⁴ Appellant enclosed a letter from its supplier’s sales agent which gave the following reason for nonperformance: “During the 7 months elapsing before receiving the approval of the Turner interrupters, American Nucletron lost the services of the engineer who had worked up the Turner application and had been counted on to be responsible for the specialized job through the factory, in case approval were obtained. To date this problem has not been satisfactorily resolved and our principals request us to advise you that rather than prolong the uncertainty of supplying the Bureau they believe they should take the initiative in suggesting that the order be cancelled.”⁵

By letter of April 29, 1970, the Bureau of Reclamation notified appellant that its failure to perform was found not to be excusable. Citing both the failure to make delivery and appellant’s stated intention not to perform, the Bureau terminated the contract for default. Appellant was advised that the requirement would be readvertised and that appellant would be held liable for any excess costs.⁶

A new solicitation was issued and all bids received thereunder were found to be nonresponsive.⁷ A con-

tract for the reprocurement was thereupon negotiated with the Joslyn Manufacturing Company. The reprocurement contract was awarded to Joslyn on June 30, 1970, in the amount of \$18,882.⁸

On November 28, 1972, a bill for collection was sent to appellant by the Bureau of Reclamation, demanding payment of excess costs of \$8,182, the difference between the original contract amount of \$10,700 and the repurchase contract amount of \$18,882.⁹

DEFAULT TERMINATION

[1] Appellant argues that it should be excused from performance because the contract as awarded was impossible to perform. This argument is based entirely on the contention that the depiction of a four-module Joslyn interrupter was a restrictive feature in the solicitation and contract and such restriction operated to the detriment of appellant. The evidence does not support appellant’s argument. The conflict between the drawing of the Joslyn interrupter and the specifications which allowed other types was resolved before award of the contract. Appellant’s response to the Bureau’s inquiry as to how many vacuum modules it proposed to furnish was that it proposed to furnish five vacuum modules to conform to

⁴ Exhibit No. 44.

⁵ Exhibit No. 44.

⁶ Exhibit No. 45.

⁷ Exhibit No. 47.

⁸ Exhibit No. 52.

⁹ Exhibit No. 6. It should be noted that the computation ignores the reduction of \$240 which occurred when the original contract was modified by acceptance of appellant’s offer to furnish Turner interrupters.

the specifications rather than four vacuum modules to conform to the drawing.¹⁰

Appellant clearly understood prior to award of the contract that the specifications prevailed over the drawing. This understanding is borne out by appellant's offer to furnish the Turner interrupter when it could not obtain the Joslyn and its representation that the Turner interrupter met all the specifications.¹¹

The final blow to appellant's argument that the drawing was restrictive is the fact that the Government's acceptance of the offer to furnish the Turner interrupter completely relieved appellant of the obligation to furnish the Joslyn interrupter depicted in the drawing. In these circumstances, we perceive no detriment to appellant from its inability to obtain the Joslyn interrupter.

Appellant's sole reason for failure to deliver the switches with the Turner interrupter was the departure of the engineer who worked up the application.¹² The rule is well settled that departure of key personnel from a contractor's supplier does not excuse the contractor from performance.¹³ Accordingly, we find that appellant's contract was properly terminated for default.

The appeal from the default termination is denied.

Excess Costs

[2] Appellant also asks that it be relieved from liability for excess costs because of the Government's failure to mitigate damages.

We do not reach the question of whether the Government took the proper actions to mitigate damages in the repurchase for the reason that the Government has failed to sustain its burden of proof with respect to excess costs. When the assessment of excess costs is challenged, the burden rests with the Government to prove entitlement to such costs.¹⁴

In the present case, the proof offered by the Government is a copy of the repurchase contract, which was negotiated with Joslyn Manufacturing Company and awarded on June 30, 1970, in the amount of \$18,882, and a copy of a bill for collection of the difference between the original contract and the repurchase contract.

In *Whitlock Corporation v. United States*, 141 Ct. Cl. 758, 765 (1958), the Government presented proof that a repurchase contract was awarded plus a certified copy of a Certificate of Indebtedness from the General Accounting Office stating that the total cost to the Government was the face amount of the repurchase contract. The Court held

¹⁰ Exhibit No. 12.

¹¹ Exhibit No. 35.

¹² Exhibit No. 44. The reason was repeated at the hearing, without further amplification, by appellant's contract administrator. (Tr. 27-28).

¹³ *Hydro Fitting Manufacturing Corp.*, ASBCA Nos. 11768, 13077 (March 13, 1970), 70-1 BCA par. 8211 at p. 38,183.

¹⁴ *Hesse Envelope Company*, GSBGA No. 3308 (October 29, 1973), 73-2 BCA par. 10,299, affirmed on Reconsideration, January 18, 1974, 74-1 BCA par. 10,423.

that the Certificate of Indebtedness did not constitute proof that the repurchase contract had either been performed or paid for.

The bill for collection in the present case does not rise to the level of the Certificate of Indebtedness which was found inadequate in *Whitlock*. The failure of the Government to introduce into evidence any vouchers or canceled checks under the repurchase contract is fatal to its attempt to establish entitlement to excess costs.¹⁵

The appeal from assessment of excess costs is sustained.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ADMINISTRATIVE APPEAL OF
SESSIONS, INC. (A CALIFORNIA
CORPORATION) v. VYOLA OLIN-
GER ORTNER (LESSOR), LEASE
NO. PSL-33, JOSEPH PATRICK
PATENCIO (LESSOR), LEASE NO.
PSL-36, LARRY OLINGER (LES-
SOR), LEASE NO. PSL-41

3 IBIA 145

Decided November 12, 1974

Appeal from Administrative orders
canceling long-term business leases.

¹⁵ *Hesse Envelope Company*, Note 14, *supra*.

AFFIRMED AND DISMISSED.

1. Indian Lands: Leases and Permits: Long-term Business: Cancellation

A lease may be canceled by the Secretary, at the request of the lessor where lessee has failed to carry out specific provisions of the lease.

2. Indian Lands: Leases and Permits: Long-term Business: Rentals—Indian Lands: Leases and Permits: Long-term Business: Waiver—Indian Lands: Leases and Permits: Long-term Busi- ness: Generally—Waiver

Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of items in default in the absence of showing that lessor voluntarily or intentionally waived the requirements under the lease.

APPEARANCES: Dillon, Boyd, Dougherty and Perrier, a professional corporation, for appellants, Sessions, Inc., a California Corporation; William M. Wirtz, staff attorney, Sacramento Regional Solicitor's Office, for Vyola Olinger Ortner, Joseph Patrick Patencio, and Larry Olinger, appellees.

OPINION BY ADMINISTRA- TIVE JUDGE WILSON IN- TERIO BOARD OF INDIAN APPEALS

The above-entitled matters come before this Board on appeals timely filed and taken by Sessions, Inc., hereinafter referred to as appellant,

that the Certificate of Indebtedness did not constitute proof that the repurchase contract had either been performed or paid for.

The bill for collection in the present case does not rise to the level of the Certificate of Indebtedness which was found inadequate in *Whitlock*. The failure of the Government to introduce into evidence any vouchers or canceled checks under the repurchase contract is fatal to its attempt to establish entitlement to excess costs.¹⁵

The appeal from assessment of excess costs is sustained.

G. HERBERT PACKWOOD,
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ADMINISTRATIVE APPEAL OF
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OPINION BY ADMINISTRA- TIVE JUDGE WILSON IN- TERIO BOARD OF INDIAN APPEALS

The above-entitled matters come before this Board on appeals timely filed and taken by Sessions, Inc., hereinafter referred to as appellant,

from decisions of the Area Director, Sacramento Area Office, Bureau of Indian Affairs, canceling three of its long-term business leases. Three separate appeals are actually involved herein. However, in the furtherance of justice and in order to expedite disposition of the appeals and on the basis that the legal and factual issues are common to all, the appeals involved herein are joined and are hereinafter referred to as appeal.

The appeal involves the cancellation of three of seven leases, PSL-33, Contract No. 14-20-0550-803; PSL-36, Contract No. 14-20-0550-805; and PSL-41, Contract No. 14-20-0550-809, on trust allotted lands, acquired by the appellant's predecessor in interest, Rancho Trailer Park, Inc., on April 11, 1960, from the three separate Indian owners, Vyola Olinger Ortner, Joseph Patrick Patencio and Larry Olinger. The leases contain identical covenants and differ only as to the rent (each lessor was to receive a varying rent on a percentage basis), description of the lands, parties, and the value of the improvements to be placed upon each individual parcel. All three of the leases involved herein became effective upon approval by the Secretary of the Interior on January 27, 1961.

The dispute centers on Articles 7, 8 and 11 of Lease No. PSL-33 and Articles 8 and 11 of Leases, No. PSL-36 and PSL-41 which in their pertinent parts provide:

7. IMPROVEMENTS

As a material part of the consideration for this lease the lessee covenants and agrees that within five (5) years after the date of approval of this lease, Lessee shall have completed construction of permanent improvements on the leased premises at a cost of and having a reasonable value of **THREE HUNDRED THOUSAND DOLLARS (\$300,000)**.

Improved trailer spaces on the leased premises at the date of approval of this lease shall be considered as part of such required permanent improvements with a value of **FIFTEEN HUNDRED DOLLARS (\$1500)** for each such improved trailer space.

8. GENERAL PLAN AND DESIGN

Within two (2) years after the approval of this lease, the Lessee shall cause and be prepared and submitted to the Secretary for approval, a general plan and architect's design for the full improvement and complete development of the entire leased premises. The Secretary shall not unreasonably withhold approval and shall either approve or state his reasons for disapproval within thirty (30) days after said plans are presented to him by the Lessee.

11. COMPLETION OF DEVELOPMENT

It is understood and agreed that the Lessee will complete the full development and improvement of the leased premises in accordance with the general plan and architect's design, approved in accordance with Article 8, above, within five (5) years from the date of the approval of this lease. If full improvement and development as specified is not completed within that period of time, the Lessee covenants and agrees that, at the request of the Secretary, Lessee will enter into an amendment of this lease, deleting from the leased premises those portions thereof not fully improved and developed. In the event that a portion of the leased premises are so deleted, the aggregate

minimum and percentage rentals under this lease and the leases of the six contiguous parcels set out in Article 1(b) hereof shall not be decreased, but such aggregate minimum and percentage rentals shall be reapportioned among the lessors on the basis of the comparative values of the lands remaining on this lease and the leases on the six contiguous parcels. For the purposes of this reapportionment, the value of the leased premises herein described shall be (FOUR HUNDRED AND FIFTY DOLLARS (\$450) per front foot for South Palm Canyon Drive frontage, to a depth of two-hundred and fifty feet (250') and SEVENTY-FIVE HUNDRED DOLLARS (\$7500) per acre for the remaining area—Lease No. PSL-33); (SEVENTY-FIVE HUNDRED DOLLARS (\$7500) per acre—Lease No. PSL-36); (SIX THOUSAND DOLLARS (\$6000) per acre—Lease No. PSL-41).

Lease No. PSL-33, between Vyola Olinger Ortner, Palm Springs Allottee No. 4 and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a five-acre tract described as the $N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$ sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California. Lease No. PSL-36, between Joseph Patrick Patencio, Palm Springs Allottee No. 17 and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a five-acre tract described as the $S\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$ sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California. Lease No. PSL-41, between Larry Norman Olinger, Palm Springs Allot-

tee No. 71, and Rancho Trailer Park, Incorporated (Sessions' predecessor in interest), covers a 7.5-acre tract described as the $N\frac{1}{2}NW\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ sec. 22, T. 4 S., R. 4 E., San Bernardino Base and Meridian, Riverside County, California.

In brief, the leases in question required the appellant to fully develop and improve within five years from January 27, 1961, the leased premises which were then used as a trailer park. To this end, the lease terms provided that appellant was to submit within two years from January 27, 1961, to the Bureau of Indian Affairs as representative of the Secretary of the Interior for approval, a general plan and architect's design for permanent improvements. The plan, if approved, required construction of the improvements to be completed by January 26, 1966.

The appellant on January 24, 1962, requested a one-year extension of time in which to submit the general plans for the full development of the leased premises. The request was denied by the Palm Springs Office of the Bureau of Indian Affairs. Again on December 22, 1962, the appellant requested a year's extension for the submission of the general plans. The Palm Springs office recommended approval of the extension through modification of the leases by supplemental agreements. Notwithstanding negoti-

ations regarding the foregoing request, **no plans were submitted up and through February 11, 1966.** Finally, on March 24, 1966, appellant submitted to the Bureau of Indian Affairs two proposed plans for development of the leased premises. The plans were unacceptable to the appellees and the Bureau of Indian Affairs since they did not meet the requirements of the leases for the full development of the leased premises. No plans appear to have been submitted thereafter by the appellant. After much fruitless negotiation among the parties concerning the obligations under the proposed plans and the leases the appellees separately requested the Bureau of Indian Affairs to proceed with cancellation of the leases.

[1] The record regarding each lease further indicates that the Bureau of Indian Affairs pursuant to 25 CFR 131.14 by letters dated September 24, 1973, December 12, 1972, and March 15, 1973, gave the appellant ten days in which to show cause why the subject leases should not be canceled for alleged defaults under Articles 7—IMPROVEMENTS, 8—GENERAL PLAN AND DESIGN, and 11—COMPLETION OF DEVELOPMENT of Lease No. PSL-33; and Articles 8—GENERAL PLAN AND DESIGN, and 11—COMPLETION OF DEVELOPMENT of Leases, No. PSL-36 and 41.

In response to the show-cause letters as to why the leases in question should not be canceled, the appellant in essence alleged that it had

(1) completed construction of permanent improvements in the reasonable amounts indicated in the respective leases (2) it had submitted alternative plans to those submitted on March 24, 1966, but that the Bureau of Indian Affairs failed to approve or disapprove the plans and that the appellees had rejected the plans without good cause (3) the appellees had waived any rights to require submission of plans or the further development of the property by the acceptance of rent for the past seven years and (4) the appellant has been precluded from developing the property by the refusal of the appellees to cooperate in the development of the property and to join in the dedication of Belardo Road required by the city of Palm Springs as a condition to further development. The Bureau found the foregoing reasons or allegations inadequate and so advised the appellant.

Thereafter, under dates of January 22, 1974, March 26, 1973, and April 20, 1973, the appellant was advised of and given 60 days in which to cure the alleged defaults under Articles 7, 8 and 11 of Lease No. PSL-33 and Articles 8 and 11 of Leases, No. PSL-36 and 41. Failure on the part of the appellant to cure the violations within the 60-day period caused the Bureau of Indian Affairs to order cancellation of the leases effective as of April 2, 1974, as to PSL-33, May 3, 1973, and June 28, 1973, as to PSL-36 and PSL-41.

The appellant from said cancellations filed timely appeals setting

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forth the following reasons or contentions why the leases in question should not be terminated or canceled:

AS TO PSL-33:

1. Sessions, Inc., submitted plans and designs for the improvements of the leased premises that have neither been approved nor disapproved by the Secretary and his subordinates.

2. Sessions' obligation to redevelop the lease PSL-33 is excused by the refusal of one or more of the Indian lessors to approve plans and designs for the redevelopment of Rancho Trailer Park and grant the dedication of city streets required for the development.

3. The Secretary and the lessor by having accepted the rent held under lease No. PSL-33, have waived Sessions' obligation under the lease to complete the development of the leased premises.

4. It would be an unjust result to forfeit lease PSL-33.

AS TO LEASES PSL-36 AND 41:

1. Sessions, Inc., has complied with its development obligations under Articles 7 (sic), 8 and 11 of the lease.

2. Sessions, Inc., has submitted plans and designs for the mobile home spaces on PSL-36 and PSL-41 that have neither been approved nor disapproved by the Secretary and his subordinates.

3. Sessions' obligation to redevelop lease PSL-36 and PSL-41 is excused by the refusal of one or more of the lessors to approve plans and designs for the redevelopment of Rancho Trailer Park and grant the dedications of city streets required for the development.

4. The Secretary and the lessor, having accepted the rent called for under lease No. PSL-36 and PSL-41, have waived Sessions' obligation under the lease to complete the development of the leased premises.

5. It would be an unjust result to forfeit leases PSL-36 and PSL-41.

Considering the Bureau of Indian Affairs' reasons for canceling the leases and the appellant's contentions hereinabove set forth opposing the cancellations, it is quite apparent that nonperformance of Articles 7, 8 and 11 of PSL-33 and Articles 8 and 11 of PSL-36 and 41 is claimed by the appellees while appellant claims waiver of performance. In short, appellant contends it is not in default of its obligations under Articles 7, 8 and 11 of Lease PSL-33 and 8 and 11 of Leases PSL-36 and 41 because the Secretary and his subordinates did not take any action with respect to the alleged plans submitted by appellant to the Bureau of Indian Affairs and the appellees as required by Article 8 of the leases. The appellant, accordingly, attributes its noncompliance under Article 11 of the leases on the Secretary's failure to act on the alleged plans under Article 8 of the leases as submitted on March 24, 1966. The alleged plans, among other things, required that the appellees dedicate part of their land to the city of Palm Springs for widening and extending certain streets through the middle of the leased premises.

We find nothing in the leases requiring the dedication as a requirement of the development of the premises. Since the dedication would require a substantial amend-

ment to the lease, it must be concluded that the Bureau of Indian Affairs was not required to approve or disapprove the alleged plans since it was not one to commercially develop the property within the terms of the leases. Moreover, refusal by the appellees to dedicate their land could hardly be deemed arbitrary or unreasonable since the dedication would possibly destroy for all times the future use of the property for commercial purposes.

In the absence of an approved extension, although requests had been made, of the period for submission of the plan and architect's design under Article 8 of the leases, the Board finds that appellant was in default thereof as of January 26, 1963.

Furthermore, the due date for the performance of the obligations under Articles 7 and 11 of PSL-33 and Article 11 of PSL-36 and 41 in accordance with the approved general plan and architect's design was January 26, 1966. In the absence of an approved extension, and the failure to complete the improvements by that date, the Board further finds appellant was in default as to those articles.

The appellant's argument or contention that the performance of the obligations imposed by Articles 7, 8 and 11 of PSL-33 and Articles 8 and 11 of PSL-36 and 41 was waived by the appellees' continued acceptance of the rentals without requiring performance of the obligations or instituting action to terminate the leases is unacceptable.

Appellant in support of the foregoing contention cites and relies heavily on the case of *Kern Sunset Oil Company v. Good Roads Oil Company*, 6 P. 2d 71, 214 Cal. 435 (1931) as being the law applicable in this case regarding waiver and forfeiture wherein the court on page 440 thereof stated:

The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach, and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule, and is supported by ample authority. * * *

While it is a generally stated rule that acceptance of rental by the lessor after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case. *Jose v. Iglesias*, 462 F.2d 214, 216 (9th Cir. 1972); *In Re Wil-Low Cafeterias, Inc.*, 95 F.2d 306, 309 (2d Cir. 1938), *cert. denied Wil-Low Cafeterias, Inc. v. 650 Madison Avenue Corporation*, 304 U.S. 567 (1938). Thus "acceptance of rent is evidence to be considered by the trier of fact but it is not necessarily conclusive." *Jose v. Iglesias*, *supra* at 216; *cf. Bledsoe v. United States*, 349 F. 2d 605, 607 (10th Cir. 1965); *Smith v. United States*, 113 F.2d 191, 193 (10th Cir. 1940).

[2] In the appeal at bar, the record indicates negotiations among the parties continued for several years after the appellant defaulted

YAKIMA ALLOTTEE NO. 124-3112)

November 19, 1974

in January 1966. The record further indicates during that time several options being considered were whether appellant would pay an increased rental, proceed with full development based on new, long-term leases, or surrender the premises to the appellees. Under these circumstances it must be concluded that the appellees did not conduct themselves so as to permit the conclusion that they had waived appellant's defaults nor had they intentionally waived the defaults in question.

Under very similar and like circumstances as in the matter herein, in the case of *Sessions, Inc. v. Morton, et al.*, 348 F. Supp. 694 (1972), affirmed in *Sessions, Inc. v. Morton, et al.*, 491 F. 2d 854 (9th Cir. 1974), the court found that acceptance of rentals by the lessors did not effect or constitute waiver of defaults. The lease there under consideration (Lease No. PSL-37), like the three leases on appeal herein, was one of the original group of seven Indian leases on the Palm Springs Reservation.

In view of the reasons hereinabove stated, this Board finds no compelling reasons to disturb the Area Director's decisions of April 2, 1974, May 3, 1973, and June 28, 1973, canceling Leases PSL-33, PSL-36 and PSL-41, and his decisions should be affirmed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.7, issued December 14, 1973) and

43 CFR 4.1(2), the decisions of the Area Director dated May 3, 1973, June 28, 1973, and April 2, 1974, canceling leases PSL-33, PSL-36 and PSL-41 be, and the same are hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

WE CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.
MITCHELL J. SABAGH,
Administrative Judge.

ESTATE OF NOCTUSIE (WILLIE)
WHIZ (DECEASED YAKIMA
ALLOTTEE NO. 124-3112)

3 IBIA 161

Decided November 19, 1974

Appeal from an order affirming will and decree of distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Alcohol—425.28.1

Evidence that decedent was a chronic alcoholic, but fails to establish that decedent had suffered damage to his brain to the degree that his memory or ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the deceased.

2. Indian Probate: Wills: Undue Influence: Failure to Establish, Opportunity—425.30.2

Undue influence is not shown when the mere opportunity existed for the exercise of influence upon the testatrix.

APPEARANCES: Tim Weaver of Hovis, Cockrill and Roy for William Austin Whiz, Jr., appellant; C. Montee Kennedy and Owen M. Panner of Panner, Johnson, Marceau and Karnopp for Arlene Katy Smith, Zelma Lee Smith, Mona Laverne Smith and Joseph Sidney Smith, appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The record indicates the above-entitled matter came on for rehearing before Administrative Law Judge Robert Snashall on September 11, 1973. From the evidence adduced therein the Judge on October 9, 1973, affirmed, with minor modifications, his order of December 8, 1972, wherein he approved Noctusie (Willie) Whiz's last will and testament dated March 24, 1971. William Austin Whiz, Jr., hereinafter referred to as appellant, through his attorney, has appealed to this forum the said order of October 9, 1973.

The document in question, as indicated by the record, was executed by Noctusie (Willie) Whiz, hereinafter referred to as testator, on March 24, 1971, at Madras, Oregon, in the law offices of Rodriguez and

Albright. With the exception of a one-dollar bequest to the appellant, the residue of the testator's trust estate is devised in equal shares to his four grandchildren, Arlene Katy Smith, Zelma Lee Smith, Mona Laverne Smith, and Joseph Sidney Smith, being children of the testator's prior-deceased daughter, Ramona Smith.

The appellant, as basis for his appeal, alleges that the testator lacked testamentary capacity to execute the last will and testament dated March 24, 1971, and that said will was the result of undue influence exerted by one Alvis Smith, Sr., designated as executor under the will.

A careful review of the record clearly indicates appellant's contentions as hereinabove set forth are entirely without merit.

There appears to be no dispute that the testator was chronically addicted to the use of alcohol for the greater part of his adult life as appellant contends. However, the appellant has failed to establish that the long and continued use of alcohol resulted in damage to his [testator's] brain to such a degree that his memory or ability to reason was affected or impaired. Moreover, the appellant has failed to establish that the testator was intoxicated on the date the will was executed. The testimony of the scrivener and the attesting witnesses clearly indicates the testator was not under the influence of any intoxicating liquor on March 24, 1971, the date on which the will was executed.

November 19, 1974

[1] The Department has consistently held that a showing of a state of habitual drunkenness of itself does not constitute testamentary incapacity. *Estate of Amelia Keyes Abbott Viramontes Walker*, IA-1339 (April 5, 1966), *affirmed*, *Simons v. Udall*, 276 F. Supp. 75 (D. Mont. 1967). Evidence that a decedent was a chronic alcoholic, but fails to establish that the decedent had suffered damage to his brain to the degree that his memory or ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the decedent. *Estate of William Bigheart, Jr.*, IA-T-21 (August 8, 1969) and IA-T-21 (Supp.) (September 4, 1969). In the *Estate of Joseph Garrick*, A-24205 (November 5, 1945) the Department held that if a testator, who was almost continuously under the influence of alcohol during the period before making his will, was sober at the time of making the will, he was competent to devise his property as he saw fit. *See also Estate of John J. Akers*, 1 IBIA 8, 77 I.D. 268 (1970), *affirmed*, *Akers v. Morton*, 333 F. Supp. 184 (D. Mont. 1971).

[2] The appellant's contention that the will was a result of undue influence is clearly not substantiated by the evidence. At most, the evidence in the case at bar establishes

mere opportunity for exertion of undue influence and suspicion on the part of appellant that such influence was exerted. Mere opportunity of undue influence and suspicion thereof is insufficient to invalidate a will. *Estate of Conrad Mausape*, IA-T-14 (December 13, 1968); *Estate of Otto Littleman (Lame Woman)*, IA-T-25 (June 5, 1970).

Considering the record as presently constituted, the Board finds that the appellant has clearly failed to come forth with any evidence to support his contentions regarding lack of testamentary capacity and undue influence. Accordingly, the decision of October 9, 1973, should be affirmed and the appeal dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge issued October 9, 1973, in the estate herein be, and the same is HEREBY AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

**ESTATE OF PETER VALLEE
(COEUR d'ALENE N-1056,
DECEASED)**

3 IBIA 167

Decided November 20, 1974

This is an order of remand to an Administrative Law Judge to correct error by the conduct of new and further proceedings.

Docketed and remanded.

1. Indian Probate: Secretary's Authority: Generally—381.0

Where it becomes necessary, the Secretary may in the exercise of his supervisory authority reserved in 43 CFR 4.5, assume original jurisdiction of a pending Indian probate, to correct an error of omission which occurred after the enactment of a statute and prior to the publication of appropriate regulations, and he may remand the case to an Administrative Law Judge for further proceedings.

2. Indian Probate: Generally—100.0

Proceedings under the regulations in 43 CFR Part 4, Subpart D §§ 4.300 *et seq.* 39 FR. 31636, August 30, 1974, published to implement the Act of September 29, 1972 (86 Stat. 744), relative to the right of a tribe to purchase lands of unenrolled heirs of deceased members of the Nez Perce Tribe having less than $\frac{1}{4}$ blood of the Tribe are matters of probate, and they are not matters which are the subject of appeal from decisions of administrative officers of the Bureau of Indian Affairs to be decided under the delegation of authority contained in the December 14, 1973 amendment of the Departmental Manual appearing at 211 DM 13.7.

3. Indian Probate: Rehearing: Pleading, Timely Filing—370.1

Where the Nez Perce Tribe has indicated its intent to take the interests of the heirs who are not enrolled in that Tribe, under authority of the Act of September 29, 1972 (86 Stat. 744), the order determining the heirs of the decedent does not terminate probate under said Act, further proceedings being necessary for determination of the fair market value, and when for lack of such further proceedings, the time for filing a petition for rehearing does not begin to run upon entry of said order except as to those issues of heirship and the like decided in the order determining heirs.

APPEARANCES: David C. Vallee, pro se.

*OPINION BY CHIEF
ADMINISTRATIVE
JUDGE McKEE*

*INTERIOR BOARD OF
INDIAN APPEALS*

Peter Vallee, an unallotted, un-enrolled Indian of the Coeur d'Alene Indian Reservation No. N-1056 died intestate possessed of trust or restricted property on the Nez Perce Reservation in Idaho on October 21, 1968.

The Act of September 29, 1972 (86 Stat. 744) was entitled:

To provide with respect to the inheritance of interests in restricted or trust land within the Nez Perce Indian Reservation, and for other purposes.

Section 4 of the Act is as follows:

The provisions of this Act shall apply to all estates pending before the Ex-

N-1056, DECEASED

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aminer of Inheritance on the date of this Act and to all future estates, but shall not apply to any estate heretofore closed.

[1] On the date the Act was approved, the probate of the estate of Peter Vallee was pending before Administrative Law Judge Elge (formerly Examiner of Inheritance), and on June 6, 1973, the order determining heirs in the estate was entered. Therein it was determined that David Charles Vallee, the appellant herein, Joan Vallee Villegas, of the Coeur d'Alene Reservation, Theresa Vallee Buffalohead, of the Coleville Reservation, Peter B. Vallee, Jr. and Michael Dean Vallee, both of the Coeur d'Alene Reservation, children of the decedent, each inherited a 2/15 interest of the decedent's lands on the Nez Perce Reservation.

On August 23, 1973, the Administrative Law Judge ordered distribution of all of the decedent's estate, except those interests on the Nez Perce Reservation passing to the above-designated heirs. The Judge thereby retained jurisdiction of those lands pending a determination of the rights of the Nez Perce Tribe under the Act of September 29, 1972, *supra*, to take the same under the tribal resolution of August 31, 1973, upon full payment of the fair market value to the Superintendent on behalf of the said heirs. According to the probate inventory, the decedent died owning an undivided $\frac{1}{2}$ interest in a portion of the allotment of Sophia Thomas, allotment

No. 838, described as lot 2. sec. 5, T. 36 N., R. 1 W., Boise Meridian, Idaho, containing 36.6 acres more or less. This property was there shown to have an *estimated* value of \$10,000.

Thereafter, on January 14, 1974, upon a full appraisal by the Bureau of Indian Affairs, Area Chief Appraiser Richard C. Swanson, the property was assigned a value of \$8,000 as of the date of the decedent's death on October 21, 1968. David C. Vallee objected to this value declaring it to be less than the fair market value as it is required to be determined by the statute. He went so far on March 28, 1974, as to file an action in United States District Court for the Eastern District of Washington, entitled *David C. Vallee, Plaintiff v. Bureau of Indian Affairs and Nez Perce Tribe*, Civil Action C-74-77, seeking relief from the alleged low appraisal. This action is still pending, but it is presumed to be subject to dismissal for failure to exhaust administrative remedies.

Thereafter, on July 24, 1974, the Bureau of Indian Affairs again appraised the property as of October 21, 1968, the date of the death of the decedent, and valued it at \$9,300 to which the said David C. Vallee also objects. Proceedings to this point are interlocutory only.

[2,3] Under procedures then being followed without the guidance of regulations, the money for a $\frac{2}{15}$ portion of the decedent's $\frac{1}{2}$ interest in allotment No. 838 was preemp-

torily transferred by the Superintendent without any order or directive from the tribal account moneys in his control to the individual accounts of each of the five heirs whose interests were subject to taking by the Tribe. The fair market value has never been "determined by the Secretary" as required by the statute. The matter was appealed to the Board of Indian Appeals as an appeal from the decision of an administrative officer of the Bureau of Indian Affairs under 211 DM 13.7 as amended December 14, 1973.

In the meantime, new regulations implementing the Act of September 29, 1972, *supra*, were published on August 30, 1974 (39 F.R. 31635) effective in 30 days. It is determined here that the said Act does not provide for the determination of fair market value as an administrative action of the Bureau of Indian Affairs. Fair market value is a determination to be made by an Administrative Law Judge upon agreement of the parties, or if no agreement can be reached, then after a hearing held in conjunction with the performance of his probate adjudication.

The finding is made that the heirs of this decedent have been deprived of due process in the determination of the fair market value of the interests in the lands on the Nez Perce Reservation, and further, that such due process may now be afforded to them by following the procedures set forth in 39 F.R. 31635, *supra*, adding to 43 CFR Part 4, new sections 4.300-4.317.

It is further noted that on July 18, 1973, subsequent to the entry of the order determining heirs the inventory of the Nez Perce land was modified to include an omitted interest. It is shown that in addition to the land included in the probate inventory at the date of death, the decedent was the owner of an undivided $\frac{1}{2}$ interest in Nez Perce tract No. 182-M147 described as the N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 7, T. 36 N., R. 4 W., B.M. containing 120 acres more or less. However this land was not assigned a value, and the modification of the inventory was not considered by the Nez Perce Tribe at the time it filed its selection of land interests to be taken from the heirs under the Act of September 29, 1972, *supra*. Any further proceedings in this probate relative to the determination of the fair market value and the disposition of those interests passing to the ineligible heirs should include all of the land located on the Nez Perce Reservation owned by the decedent at the time of his death.

NOW, THEREFORE, under and by virtue of the authority contained in the delegation of December 14, 1973 (211 DM 13.7) and in 43 CFR 4.1 this matter is REMANDED to Administrative Law Judge Elge for further proceedings according to the findings herein, and issuance of a decision final for the Department unless appealed pursuant to the regulations published in 39 F.R. 31635 *et seq.*

November 27, 1974

This decision is final for this proceeding.

DAVID J. McKEE,
Chief Administrative Judge.

WE CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

**APPEAL OF HARRIS-SEYBOLD
COMPANY (A DIVISION OF HAR-
RIS-INTERTYPE CORPORATION)**

IBCA-1017-1-74

Decided November 27, 1974

Contract No. 14-08-0001-13986, Five-color offset, sheet-fed lithographic printing press, U.S. Geological Survey.

Granted.

**1. Contracts: Formation and Validity:
Bid Award—Contracts: Construction
and Operation: Changes and Extras—
Contracts: Disputes and Remedies:
Equitable Adjustments**

Where under a contract for a printing press a contractor is required to furnish a device known as a punch in order to meet its alleged contractual obligation and where the evidence of record shows that the punch was listed as an optional item of equipment in the descriptive literature accompanying the bid upon which the contract was based, the Board determines the contract price should be equitably adjusted to reflect the furnishing of the punch.

APPEARANCES: Mr. Paul H. Schafer, Federal Government Sales Manager, Washington, D.C., for appellant; Mr. Thomas A. Darner, Department Counsel, Washington, D.C., for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW

**INTERIOR BOARD OF
CONTRACT APPEALS**

The question presented by this appeal is whether the contractor is required to supply a device called a punch¹ in order to fulfill its contractual obligation to the Government for a printing press.

The invitation for bids and the resulting contract² describe the printing press in the following terms:

A. For furnishing, delivering, installing and demonstrating the satisfactory operation of a five-color offset, sheet-fed lithographic printing press in accordance with the United States Department of the Interior, Geological Survey specifications listed in Part IV * * *.

In denying the contractor's claim that furnishing the punch was not part of the contractual obligation

¹The punch is a separate tool which is not normally located where the press is (Tr. 17). Ninety-five percent of the presses delivered by appellant are not used in conjunction with a punch (Tr. 21).

²Item 1. All references to items are to those contained in the appeal file. The contractor bid the sum of \$735,208.16 for the job. Deducting trade-in allowances offered the Government for four offset presses ranging from 14 to 22 years old, the net price for performing the contract work called for was in the amount of \$673,708.16.

assumed by the bid submitted, the contracting officer cited³ Paragraph 19 of Part IV⁴ which in especially pertinent part reads as follows:

* * * The press shall come equipped with a system (pin or equivalent) to provide close registration between units during initial start up. It is intended that this system should lessen the total make ready time.

At the hearing the Government relied principally on Paragraph 19 but it attempted to buttress its position by citing and quoting from other contractual provisions. Particular emphasis was placed upon the language employed in describing the press as quoted above (Tr. 50) and the following language from Paragraph 10 of Part IV and Paragraph A-6 of Attachment B to the contract (See appendix):

10. *GENERAL*: * * * The press shall be supplied with all equipment necessary for safe and satisfactory operation and servicing. * * * (Tr. 50.)

* * * * *

A-6 *SURVEY SPECIFICATIONS*: In general, Survey specifications are intended to show and set forth the grade, general design, and functional requirements of the desired equipment without attempting a complete design. Therefore, such equipment shall be furnished complete in every respect for performing the specified functional requirements, even though details, features, etc., are not shown or described fully, or at all, by the attendant drawings or specifications. * * * (Tr. 54, 55.)

³ Items 3 and 6.

⁴ See Appendix for pertinent excerpts from the specifications including those from Part IV.

The Government contends that without the punch the specified pins are useless⁵ and that the printing press will not meet the specification requirement to lessen the total make ready time (Tr. 55). While conceding that lessening the make ready time is the general purpose designed to be served by the punch, the appellant asserts that the punch may or may not achieve this objective (Tr. 36, 41). The appellant's claim is grounded principally upon the fact, however, that the punch was listed as an optional item of equipment in the descriptive literature furnished with its bid (Tr. 11, 30-31, 39 and 77).

Government witness Rolufs⁶ testified that he had participated in the preparation of the specifications. It was his testimony that when the various contract provisions are interpreted as an in-

⁵ In the letter to the contracting officer of November 27, 1973 (Item 5), the appellant states " * * * knowing your facility normally employed a pin register system other than Harris' we did not consider the lack of a specific request for a Harris Key Register Punch in your specifications as significant." At the hearing appellant's witness Schafer stated: "But my point is knowing that they have the other punches and another punch system, it is somewhat impractical for us to know whether they are going to use their own punches or someone else's. It was certainly reasonable for us to assume that they would use their punch system and adapt it to what we were delivering on the press, which is not unusual at all, and would be much more economical." (Tr. 28.) See also Tr. 37, 38.

⁶ Mr. Larry Rolufs, Chief, Branch of Printing with the Eastern Region Publications Division, United States Geological Survey. At the time the contract was written, Mr. Rolufs was a printing officer on the staff of the Publications Division Chief who was assigned to perform liaison work with the branch of contracts.

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tegrated whole, and not in isolation, they establish the requirement for a pin registry system that includes the use of a punch. (Tr. 49-55).⁷ The following colloquy with this witness upon direct examination underscores the importance the Government attaches to the concluding sentences of Paragraph 19, *supra*:

Q. Will the press meet its functional requirement stated in the specification, registry system, pin or equivalent, without a punch?

A. No.

Judge Lynch: "Would you repeat that question again, please?"

Q. Will the press meet its functional requirement of a registry system, pin or equivalent, utilizing pins, without the punch?

A. In a narrow interpretation, the answer would be yes. In the interpretation of would it meet the specification as constituted, no.

Q. Which includes lessen make-ready time?

A. Correct. (Tr. 55.)

The appellant took no exceptions to the specification in the invitation; according to their interpretation of the way it was written they agreed with it (Tr. 34). While recognizing that the pins in the press were

largely, if not entirely, nonfunctional unless a punch is employed to make holes in the lithographic plates,⁸ the appellant's witness Schafer testified that at the time the bid was submitted the appellant knew the Government had punches of its own and that these could either be used or modified for use with appellant's press or that punches obtained elsewhere could be utilized.⁹ Addressing himself to the language contained in Paragraph 19, Schafer stated:

It says, "The press shall come equipped." The press shall come equipped with a system, and it did come equipped with a system. It is standard equipment, and it is on the press, but that does not include the punch which we clearly showed and exhibited in our literature and in our spec sheet which was furnished with the bid, before the bid, in our conversations with various individuals, that that was an optional piece of equipment, the same as such items that appear on page 14 under Paragraph 31,¹⁰ where the number of optional pieces of equipment were ordered and so spelled out, if they wanted those to come with the press.

⁸ Tr. 18, 35, 38. Government witness Rolufs testified at some length as to the importance the Government ascribed to the punch (Tr. 46-47, 53-55, 64).

⁹ Tr. 10, 19-21, 28. Rolufs testified that the Government had only two devices which were used for punching film and which could not be used with the presses as such (Tr. 57). He did not address himself directly to whether either device could be modified so that it could be used to punch the aluminum plates. After hearing Rolufs' testimony appellant's witness Schafer reiterated his position that the devices owned by the Government could be modified and used to punch the plates or that someone else's punch could be so used (Tr. 76).

¹⁰ See Paragraph 31 in the Appendix for the extra equipment required to be furnished "for use with the press and which shall be included in the bid price."

⁷ Summarizing its position in one of the claim letters, appellant states: "The patented 'Harris Key Register System' * * * as understood and merchandised by Harris-Seybold Company since its inception, consists of abutment keys or pins built into the plate cylinder. To properly prepare plates to utilize these abutment pins, a Key Register Punch must be employed by the platemaker. * * * Since the punch is a separate tool, it has always been sold as a separate item and is not included as a standard press accessory." (Item 5.) See also n. 1, *supra*.

From our standpoint, frankly, we couldn't determine whether they were going to use their own punch or modify their punch or exactly how this was going to finally work out, so as a result we did not include a quote on the cost of a punch. * * * (Tr. 11.)

Elsewhere in his testimony Mr. Schafer stated unequivocally that the literature which accompanied the appellant's bid had listed the punch as optional equipment.¹¹ In support of this position appellant's Exhibit No. 1 was offered and received in evidence.¹² At one time the Government appears to have had some doubt as to whether the descriptive literature which accompanied appellant's bid had listed the punch as an optional equipment item.¹³ Mr. Schafer's testimony in this area was not impugned on cross-examination, however, and is uncontradicted. We therefore find that the appellant's bid as submitted did list appellant's punch as an optional item of equipment.

The testimony adduced at the hearing disclosed that even without the punch the press offered by the appellant will meet the requirement of Paragraph 10 to "print in five colors with one pass * * * in .003"

register throughout the press run." (See appendix.)¹⁴ There is also no question but that the appellant's press without the punch will materially reduce the time required for printing.¹⁵ It appears clear from the evidence, however, that appellant's press without the punch will not be as efficient as appellant's press will be when used in conjunction with appellant's punch or another punch with which it is compatible. Government witness Rolufs' testimony on this point¹⁶ is clearly of greater probative value than is the somewhat elusive testimony¹⁷ offered in this area by appellant's witness Schafer.

Decision

We have no reason to doubt that when the invitation for bids was issued the Government hoped to obtain not only a printing press but the punch¹⁸ in issue here. The subjective intent of a party to a contract is not, of course, controlling.¹⁹

¹⁴ Tr. 15-16, 25-26, 63-65.

¹⁵ On cross-examination Government witness Rolufs gave the following testimony: "Q. * * * may I assume, that even though you didn't have the punch and the mechanism in the press and so forth, that you would save considerable time over the way you are producing the maps and charts now in the present equipment? A. Certainly, because you could do it in one pass instead of two-three passes through the press." (Tr. 60.)

¹⁶ Tr. 49, 52-53, 64.

¹⁷ Tr. 24-25, 27-28, 36.

¹⁸ Tr. 46-47.

¹⁹ *Corbetta Construction Co., Inc. v. United States*, 198 Ct. Cl. 712, 723 (1972) ("A government contractor cannot properly be required to exercise clairvoyance in determining its contractual responsibilities. The crucial question is 'what plaintiff would have understood as a reasonable construction contractor', not what the drafter of the contract terms

¹¹ Tr. 29-31.

¹² Tr. 28-32. See the Appendix for the pertinent excerpts from the color brochure and the model specifications included with the descriptive literature which accompanied appellant's bid (Appellant's Exhibit No. 1).

¹³ Tr. 29-30. Under the Government's interpretation of the contract requirement information pertaining to the punch would appear to be required in any event, since Part VIII provides: "* * * The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish * * *" (See Appendix.)

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If at the time the invitation was issued the punch was as important to the effective functioning of the press as now appears to be the case, it is at least surprising that the Government should have been content to rely for the requirement upon a parenthetical reference in Paragraph 19 which fails to even mention the punch and upon some general language in other contract provisions which refer to "satisfactory operation" and which call for the press to be "furnished complete in every respect for performing the specified functional requirements." Such provisions were inadequate to impose the obligation of furnishing a punch upon the appellant.

Viewed from the perspective of hindsight it appears obvious that the Government could have made its intention crystal clear by simply including the punch among the extra equipment required to be furnished as it did with respect to the items listed in Paragraph 31. (See Appendix.) In fact, however, as we have found, the descriptive literature which accompanied—and was required to accompany—appellant's bid specifically listed the punch as an optional item of equipment. The fact that the punch was so listed is

fatal to the Government's case.²⁰ On the basis of the record made in these proceedings the Government is in the position of demanding the appellant furnish a punch as part of the contractual obligation assumed when the bid upon which the contract is based showed the punch to be an extra.²¹ The effect of the Government's action was to constructively change the requirements of the contract. We find the appellant is entitled to an equitable adjustment therefor in the amount of \$1,890.²²

Conclusion

The appeal is granted.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I CONCUR:

SHERMAN P. KIMBALL,
Administrative Judge.

²⁰ *Perry and Wallis, Inc. v. United States*, 192 Ct. Cl. 310, 314-15 (1970); *Placer County, California*, IBCA-777-5-69, 78 I.D. 113, 128 (1971), 71-1 BCA par. 8801, at 40,888-889, note 72 and accompanying text.

²¹ The Government officials responsible for making award under the invitation were not at liberty to ignore the descriptive literature which accompanied appellant's bid and which listed the punch involved in this appeal as an optional item of equipment. If at the time of contract award the Government viewed the invitation as requiring the furnishing of a punch as part of the consideration for the stated contract price (see note 2, *supra*), the appellant's bid should have been rejected as nonresponsive. See Dec. Comp. Gen. B-177699 (April 24, 1973) and Dec. Comp. Gen. B-174892 (March 6, 1972).

²² The issue of quantum was not reserved and there is no evidence of record indicating that the Government contests the reasonableness of the \$1,890 claimed by the appellant.

subjectively intended. * * * (footnote and citations omitted)); *General Electric Co.*, IBCA-451-8-64, 73 I.D. 95, 101 (1966), 66-1 BCA par. 5507, at 25,789, note 10 and accompanying text.

APPENDIX

IV SPECIFICATIONS

A. The following specifications apply to the item listed in Part I.A.:

1. **SCOPE:** This specification covers a five-color offset, sheet-fed lithographic printing press for use in the United States Geological Survey, Map Printing Plant, Reston, Va., herein after referred to as the "Survey."

2. **FUNCTIONAL REQUIREMENT:** The press shall be capable of satisfactorily printing U.S. Geological Survey Topographic Maps (four subjects per sheet) on sheets 44" x 58" by the lithographic process at a sustained production rate of at least 6,000 sheets per hour. Color bars will be run on the sheet. In printing, the 58" dimension shall be parallel to the axis of the plate cylinder. Presses shall be complete in all respects for safe and satisfactory operation and shall be designed and constructed for sustained use, 24 hours per day, six days per week. Presses shall be convenient to operate and shall require a minimum amount of maintenance.

7. **STANDARD EQUIPMENT:** Except as may otherwise be specified herein, the press shall be equipped with all attachments and features regularly supplied by the manufacturer as standard commercial equipment whether or not the features or attachments are specifically enumerated herein.

10. **GENERAL:** The press shall reproduce line and halftone printing subjects by the lithographic offset process. The press shall print in five colors with one pass (or in more than five colors with successive passes), in .003" register throughout the press run. * * * The press shall be supplied with all equipment necessary for safe and satisfactory operation and servicing. * * *

19. **SHEET REGISTERING MECHANISM:** Front guides shall be adjustable. Two side guides shall be provided

for either feeder or gear side registration of any width sheet within the rated capacity of the press and shall be of the pull type. In addition, the press shall be equipped with an alarm system to indicate side guide misregister, and electronic sheet and air holddowns on impression cylinders. The press shall come equipped with a system (pin or equivalent) to provide close registration between units during initial start up. It is intended that this system should lessen the total make-ready time.

31. **EXTRA EQUIPMENT:** The press shall be furnished completely equipped for safe and satisfactory operation in printing the full range of sheet sizes and thicknesses specified. In addition, the Contractor shall furnish the following extra equipment which shall be designed for use with the press and which shall be included in the bid price. This extra equipment shall be over and above that furnished with the press proper.

(10) Complete sets of feeder suckers assorted for various thicknesses of stock.

(5) Sets of blanket clamps

(5) Ink fountain washup blades (Nylex or equal)

(1) Set of feeder tapes

(1) Complete set of covered inking rollers

(2) Heavy duty static neutralizers (Herbert or equal)

(10) Ink fountain dividers

(2) Sets of motor brushes for each D.C. Motor

VIII DESCRIPTIVE LITERATURE

A. Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish.

B. Failure of descriptive literature to show that the product offered conforms to

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the specifications and other requirements of this Invitation for Bids will require rejection of the bid. * * *

IX. BIDDERS' CONFERENCE

B. The bidders' conference will be held to further acquaint all prospective bidders with the requirements of the United States Geological Survey as described herein. A tour of the Government's place of installation in Reston, Virginia will be part of the conference. Prospective bidders will also be given an opportunity to examine the Government's trade-in presses, see Part I.B.

XV. OTHER TERMS AND CONDITIONS

A. The following documents shall be made a part of any resultant contract:

1. General Provisions, Standard Form 32, Nov. 1969 edition, which is incorporated herein by reference.

3. Attachment B entitled "U.S.G.S. General Conditions for Mechanical and Electrical Equipment," pages 1 through 4.

ATTACHMENT B

General Conditions

For Mechanical and Electrical Equipment

A-6 SURVEY SPECIFICATIONS: In general, Survey specifications are intended to show and set forth the grade, general design, and functional requirements of the desired equipment without attempting a complete design. Therefore, such equipment shall be furnished complete in every respect for performing the specified functional requirements, even though details, features, etc., are not shown or described fully, or at all, by the attendant drawings or specifications. However, when specific features are required by the specifications, no variations will be permitted.

APPELLANT'S EXHIBIT NO. 1

Harris L-60-A Presses

Optional equipment

Series 600 Key Register Punch

MODEL SPECIFICATIONS

OPTIONAL EQUIPMENT

Series 600 Plate Preregister punch

PEGGS RUN COAL COMPANY, INC.

3 IBMA 404

Decided November 29, 1974

Appeal by Peggs Run Coal Company from a decision by an Administrative Law Judge dated December 19, 1973 (Docket No. PITT 72-28-P) assessing civil penalties in a total amount of \$7,677 for violations pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, hereinafter (Act).

Affirmed in part, modified in part.

1. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

A violation of 30 CFR 75.312, proscribing ventilation of working places with air that has passed through an abandoned area, or an area unsafe or inaccessible

for inspection, is not proved in the absence of a showing that the areas through which the air has passed was in fact abandoned, unsafe or inaccessible for inspection.

APPEARANCES: Richard M. Sharp, Esq., for appellant Peggs Run Coal Company, Inc., John H. O'Donnell, Esq., for appellee Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The charges involved in this proceeding arise from inspections of Peggs Run Coal Company's No. 2 Mine conducted in January, February and March of 1971. An amended Petition for Assessment of Civil Penalties filed by MESA charged 19 violations of the Federal Coal Mine Health and Safety Act of 1969¹ as described in 18 Notices of Violation and 1 Order of Withdrawal.

A full evidentiary hearing on the matter was held at Pittsburgh, Pennsylvania, on June 22, 1973. On December 19, 1973, the Administrative Law Judge (Judge) who conducted the hearing issued an initial decision. On appeal to this Board, Peggs Run takes issue with 12 of the 19 violations for which penalties were assessed by the Judge in his decision.

At the hearing, MESA presented evidence tending to prove that all

19 of the alleged violations did in fact occur. As to 7 of the violations here on appeal, Peggs Run acknowledges the fact of violation but pleads mitigating circumstances. In the remaining 5 alleged violations Peggs Run assigns various errors and also generally asserts that the amounts assessed by the Judge are unreasonably high. In this vein, Peggs Run argues that it suffered a business loss in excess of \$200,000 between March and September 1972, which was not, but should have been, considered by the Judge in assessment of penalties.

Issues on Appeal

Whether the Judge erred in determining that the alleged violations of mandatory health or safety standards occurred.

Whether the Judge properly applied one or more of the six statutory criteria of the Act in assessing penalties.

Discussion

[1] After carefully reviewing the record and briefs of the parties, we conclude that with respect to 10 of the 12 violations here appealed, Peggs Run has failed to present any mitigating circumstances, rebuttal evidence, or assignments of error, which would warrant our disturbing the findings and conclusions of the Judge. Peggs Run's contentions here are substantially the same as those advanced in a prior proceeding, viz., *Peggs Run Coal Company, Inc.*, 3 IBMA 289, 81 I.D. 443, 1973-1974 OSHD, par. 18,300 (1974), and dealt with by this Board in that case.

¹P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. § 801-960 (1970).

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Consequently, we affirm the Judge's decision on these 10 violations.² With respect to the remaining two Notices however, our review indicates that one should be vacated and that the assessment in the other should be reduced. Our views on these two Notices are as follows:

I

Notice No. 2 WTM, March 5, 1971, charged Peggs Run with a violation of 30 CFR 75.312. The citation in the Notice is as follows:

There are two sets of idle workings adjacent to the section where coal is being mined. The first section is to the right of the active workings and the other set of entries is perpendicular to the active workings. The air is passing through these workings and is used to ventilate the faces where coal is being mined.

Section 75.312 provides in pertinent part:

Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine. * * *

² See table below:

Observing that the operator was pressed for time and manpower, the inspector, on March 10, 1971, issued a Notice of Extension which stated that the two sets of idle workings were being "sealed or ventilated." The inspector testified that he issued the extension because the idle workings were being inspected prior to each shift and because the operator intended to seal off one of the sections (Tr. 198). The Notice of Abatement, issued March 22, described the abatement as follows:

One set of idle workings was sealed off by installing 8 block stoppings and the other set of idle workings was ventilated by installing 2 air-lock doors and 2 block stoppings and check curtains to direct the air across the face.

The record indicates that a water-pump was located in one of the idle workings (Tr. 197) and that the other was used to store rock dust, roof bolts, plastic pipe and other materials (Tr. 246-7). The inspector testified, at first, that he deemed these workings to be abandoned because he could find no record that they were being inspected regularly by the operator's personnel (Tr.

Gov't Exh. No.	Notice No.	Date	Violation of Regulation
Exh. 2.....	1 WTM.....	February 18, 1971.....	Sec. 75.1712-1
Exh. 16.....	1 CLT.....	January 13, 1971.....	75.302
Exh. 18.....	2 CLT.....	January 13, 1971.....	75.307-1
Exh. 29.....	1 WTM.....	February 1, 1971.....	75.400
Exh. 33.....	3 WTM.....	February 1, 1971.....	75.302
Exh. 35.....	1 WTM (Order).....	February 18, 1971.....	75.200
Exh. 37.....	1 WTM.....	February 18, 1971.....	75.200
Exh. 39.....	2 WTM.....	February 18, 1971.....	75.1105
Exh. 41.....	1 WTM.....	March 5, 1971.....	75.200
Exh. 47.....	1 WTM.....	March 9, 1971.....	75.400

197-8). He later changed this testimony to concede that these workings were not in fact abandoned inasmuch as they were being utilized for storage. He also modified his position on the point of inspection, stating that the idle workings *were* included in preshift examination, but that such examination was not recorded (Tr. 247), and that he would not necessarily expect the operator's records to reflect the examination of the areas in question (Tr. 202).

The Judge found this violation to have occurred in that Peggs Run's records revealed no preshift examinations of the idle workings. He further stated:

The Respondent abated the [alleged violations] by including the inactive sections in its preshift examinations until (1) the section to the right could be sealed by installing permanent stoppings and (2) air lock doors could be installed at the entrance to the section straight ahead of the haulage road, with block stoppings to direct the air to the air-lock doors. Finally, the respondent installed check curtains to direct the air from the tram road to the faces.

The Judge assessed a \$100 penalty.

Peggs Run argues that a violation of the regulation cited was not proved because (1) the workings were not shown to be abandoned, and (2) the fact that there was no record of preshift examination does not warrant the conclusion that no examination was made.

MESA concedes that the idle workings were accessible to inspection, but argues that idle areas and

abandoned areas are synonymous for purposes of 30 CFR 75.312, and appears to be of the view that the instant violation consisted in failure of inspections of the idled areas.

[2] For the reasons which follow we think that a violation of the cited standard was not proved. The pertinent regulation, 30 CFR 75.312, prescribes the ventilation of a working place with air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection. These prerequisites to a finding of the violation cited were neither alleged in the Notice nor adduced at the hearing. While the Judge's decision and the brief of MESA rely strongly on the lack of documentation of preshift examination by the operator, such an examination is not mandated by section 75.312. Nor do the three documents issued by the inspector (Gov't. Exh's 44, 45, and 46) mention the lack of preshift examination or refer to its as a means of abating the violation cited. The failure to inspect an inactive area is not the criterion to be applied in determining whether or not a violation of the cited standard occurred.³

Notice No. 2 WTM March 5, 1971, is therefore vacated and the associated assessment set aside.

³ Another mandatory safety standard, sec. 75.314, does require that "idle and abandoned areas" be inspected for methane, oxygen deficiency and other dangerous conditions not more than 3 hours before other persons are permitted to enter or work in such areas. This standard, however, is not concerned with air used for ventilation.

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II

Notice No. 1 WTM, March 10, 1971, charged Peggs Run with a violation of 30 CFR 75.1704 as follows:

The return escapeway from the 1 butt left off second west section was obstructed by water near the No. 3 belt drive and approximately 1,500 feet in by the drift mouth and also near the mine fan at the surface. There are also two falls near the surface that need leveling and roof supported in the return escapeway.

Section 75.1704 provides in pertinent part:

* * * at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. * * *

The inspector testified that at the time of this alleged violation the beltline was a feasible alternative escapeway (Tr. 227-8). He also stated that the operator did not have an intake escapeway continuous to the surface (Tr. 229). Peggs Run's safety director testified, however, that there were three escapeways: (1) the tractor haulage road or intake course; (2) the beltline; and (3) the return where this alleged violation occurred (Tr. 249-50). The return and the intake routes

were marked and designated as escapeways (Tr. 251-2). The beltline, however, was not marked as an escapeway. The inspector felt that despite the considerable impediments to travel in the air return, the return was passable (Tr. 228) even, if need be, for stretcher bearers (Tr. 223). This was, in his opinion, not a serious violation because of the remote probability that this particular escape route would need to be used.

The Judge found that the return was obstructed due to negligent maintenance. He made no findings as to the seriousness of this violation but assessed a penalty of \$500.

The evidence indicates that there were three possible escapeways at the time this notice of violation was issued but that one of these was obstructed and another was not marked as an escapeway. The violation, therefore, occurred in that there were not two properly maintained and designated escapeways. In view of the testimony that the unmarked beltline was generally regarded by miners to be an accessible escapeway, and in view of the inspector's testimony on seriousness, we find that this violation was not serious and reduce the penalty from \$500 to \$100.

III

We now consider Peggs Run's complaint that the Judge failed to take into account its business losses

in assessing penalties. Peggs Run submitted a combined balance sheet and profit and loss statement which shows that from March 1972 through December 1972 its total income was \$1,056,999.27 while its total expenses were \$1,288,936.43. Thus its losses for this period were \$231,937.16. The Judge concluded that this information in itself was insufficient to support mitigation of otherwise appropriate penalties since it had no bearing on Peggs Run's ability to continue in business.

We perceive no error in this conclusion under the circumstances of the instant case. Peggs Run failed to adduce data showing that payment of penalties assessed by the Judge would have an effect on its ability to continue in business. It may therefore be presumed that the penalties assessed will have no adverse effect on ability to continue in business, *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD, par. 16,618 (1973). Moreover, no evidence has been presented from which the Board could conclude that the penalties are not appropriate to the size of the operator's business.

We conclude that the penalties as herein finally assessed are not unreasonably high, inappropriate to the size of the mine, and will not adversely affect its ability to continue in business.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1 (4)), IT IS ORDERED that the decision appealed from IS **AFFIRMED**, except that

1. Notice No. 2 WTM, March 5, 1971, IS **VACATED** and the associated assessment **SET ASIDE**;

2. The penalty under Notice No. 1 WTM, March 9, 1971, is reduced from \$500 to \$100.

IT IS FURTHER ORDERED that Peggs Run Coal Company, Inc., pay the penalties hereby finally assessed in the total amount of \$7,177 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

December 2, 1974

APPEAL OF PRE-CON, INC.**IBCA-986-3-73**

Decided December 2, 1974

Contract No. 14-06-D-7427, Butterfly Valves for Westlands Water District, Distribution System, Central Valley Project, Bureau of Reclamation.

Sustained.

**1. Contracts: Disputes and Remedies:
Damages: Liquidated Damages**

A supply contract provision for liquidated damages which set a fixed amount per unit per day for delay was not a reasonable forecast of just compensation for the harm caused by the delay where it could be determined in advance that the only harm to the Government would be an additional installation cost for each unit and the assessment of liquidated damages under such contract provision was found to be an unenforceable penalty.

APPEARANCES: Mr. R. James Porras, President, Pre-Con, Inc., Bellevue, Washington, for appellant; Mr. Ralph O. Canaday, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

**INTERIOR BOARD OF
CONTRACT APPEALS**

This is a timely appeal from the contracting officer's determination that delays in delivery under a supply contract were not excusable, resulting in assessment of liquidated damages of \$14,889.

Invitation for Bids No. (D) J-33,434-B was issued on March 14,

1972, calling for bids on 200 Butterfly Valves for Westlands Water Distribution System—Central Valley Project. The invitation resulted in receipt of four bids including that of appellant. Two of the bids took exception to the requirement of the specifications that the butterfly valves conform to AWWA Standard C504 and were declared non-responsive. Another bid took exception to the type of renewable valve seat required by the specifications and was also declared non-responsive. Appellant's bid was the only one of the four bids received which was found to be responsive. A contract in the amount of \$35,938 was awarded to appellant on May 23, 1972.¹ The contract contained a special provision for liquidated damages in the amount of \$3 per butterfly valve for each calendar day of delay beyond the specified delivery schedule.²

Appellant submitted its bid as a regular dealer in the supplies offered. In doing so, it relied upon oral representations from a supplier that the supplier could furnish butterfly valves meeting AWWA Standard C504. After award, appellant learn-

¹ Appeal File: Statement and Certificate of Award Dated May 23, 1972.

² "3. DELAYS-LIQUIDATED DAMAGES

If the contractor refuses or fails to perform or make delivery at the destination of the materials or supplies within the required time or times specified under the solicitation schedule, or should the contract be terminated as provided above, the amount of the liquidated damages to be charged for failure to perform or for failure to deliver the materials at the destination within the required time or times specified will be three dollars (\$3) per butterfly valve for each calendar day of delay."

ed that the supplier had only a 30-inch valve which met the AWWA standard and could not furnish any of the smaller sizes called for in the contract. Appellant found another source of supply, but difficulties in meeting the standard resulted in all but 10 of the 200 valves being delivered late.³

The contracting officer found that late deliveries, ranging from one day to fifty-one days, of 190 valves resulted in a total delay of 4,963 valve days. The contracting officer further found that failure to have an assured source of supply was not an excuse for the delay and he assessed liquidated damages totaling \$14,889.⁴

Appellant contended that liquidated damages in that amount were unjust and pointed out that Bureau of Reclamation Solicitation (D) J-33,447-A, dated August 14, 1972, for

³ Tr. 10: Testimony of Pre-Con's contract administrator, Robert L. Reed.

⁴ One hundred valves in Group 1 were scheduled to be delivered on September 27, 1972, with the remaining one hundred valves in Group 2 to be delivered on November 6, 1972. The contracting officer made the following analysis of the delay in his Finding of Fact, dated January 24, 1973:

"The indicated number of butterfly valves were delivered to the destination on the specified dates resulting in the following delays in delivery:

Group 1

Seventeen 8-inch butterfly valves were received on 10-13-72

16 days' delay----- $17 \times 16 = 272$ valve-days delay

Forty-two 10-in butterfly valves were received on 11-16-72

50 days' delay----- $42 \times 50 = 2,100$ valve-days delay

Three 10-inch butterfly valves were received on 11-17-72

51 days' delay----- $3 \times 51 = 153$ valve-days delay

Twenty 12-inch butterfly valves were received on 10-30-72

235 butterfly valves for the same destination, changed the measure of liquidated damages to \$45 per day for any delay and did not make a separate charge for each butterfly valve.⁵ Appellant noted that its longest delay was 51 days and asserted that application of the more recent measure of damages would result in a total of \$2,295 in liqui-

33 days' delay----- $20 \times 33 = 660$ valve-days delay

Eighteen 12-inch butterfly valves were received on 11-7-72

41 days' delay----- $18 \times 41 = 739$ valve-days delay

Group 2

Ten 8-inch butterfly valves were received on 10-13-72

No delay

Fifteen 10-inch butterfly valves were received on 11-17-72

11 days' delay----- $15 \times 11 = 165$ valve-days delay

Thirty 10-inch butterfly valves were received on 11-22-72

16 days' delay----- $30 \times 16 = 480$ valve-days delay

Twelve 12-inch butterfly valves were received on 11-7-72

1 day's delay----- $12 \times 1 = 12$ valve-days delay

Five 12-inch butterfly valves were received on 11-17-72

11 days' delay----- $5 \times 11 = 55$ valve-days delay

Twenty 12-inch butterfly valves were received on 11-22-72

16 days' delay----- $20 \times 16 = 320$ valve-days delay

Eight 14-inch butterfly valves were received on 11-7-72

1 days' delay----- $8 \times 1 = 8$ valve-days delay

Total delivery delay----- 4,963 valve-days."

⁵ Solicitation (D) J-33,447-A contains the following provision for liquidated damages:

"3. DELAYS-LIQUIDATED DAMAGES

If the contractor refuses or fails to perform or make shipment from the shipping point (or points) of the materials or supplies within the required time or times specified under the solicitation schedule, or should the contract be terminated as provided above, the amount of liquidated damages to be charged for failure to perform or for failure to ship the materials, or any part thereof within the required time or times specified will be forty-five dollars (\$45) for each calendar day of delay."

December 2, 1974

dated damages rather than \$14,889. Appellant asked the Board to apply the rate resulting in the lower figure.⁶

The Government moved to dismiss the appeal, arguing that the Board lacked the power to reform the contract in such manner. The Board agreed that reformation of a contract is not within its jurisdiction, but the motion to dismiss was denied when the Board construed the appeal as having raised the question whether the liquidated damages clause was unenforceable as a penalty.⁷

The Bureau of Reclamation used \$3 per butterfly valve per day as the measure of liquidated damages in its supply contracts from 1968 until the clause was changed in August 1972. The present contracting officer was not associated with the organization until September 1972, and could offer no information as to the basis for the initial decision to use \$3 per valve per day or the basis for the subsequent decision to change the measure of liquidated damages to \$45 per day for any delay.⁸

The contracting officer testified that both valves and flow meters are necessary to place newly completed laterals of the irrigation system in operation. When available, the butterfly valves and flow meters are installed as a unit. Lack of a butterfly valve does not prevent operation

of a completed lateral, since a shut off valve may be used on a temporary basis to control the flow of water. When a butterfly valve is delivered late, it cannot be installed at the same time as the flow meter and an additional trip is necessary to install it. The contracting officer consulted with the field personnel involved in the installations and found that it would cost approximately \$50 for each additional trip to install a butterfly valve.⁹

[1] The rule of law used to determine whether a liquidated damages provision of a contract will be upheld or struck down as an unenforceable penalty is stated by the American Law Institute as follows:

§ 339. LIQUIDATED DAMAGES AND PENALTIES.

(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) the amount so fixed is a reasonable forecast of just compensation for harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

Restatement of the Law, Contracts, (1932).

This Board follows the rule set forth in the Restatement¹⁰ and does not hesitate to declare that a liquidated damages provision is unenforceable when it is not a reasonable forecast of just compensation for

⁶ Letter of March 13, 1973, accompanying notice of appeal.

⁷ *Pre-Con, Inc.*, IBCA-936-3-73 (September 4, 1973), 73-2 BCA par. 10,227.

⁸ Tr. 36. Testimony of Joseph F. Bangs, Contracting Officer.

⁹ Tr. 29-31.

¹⁰ *Wells Construction*, IBCA-737-10-68 (September 11, 1969), 69-2 BCA par. 7866.

the harm that may be caused by a breach.¹¹

The propriety of a liquidated damages clause must be judged as of the time of making the contract.¹² The present contracting officer had no difficulty in determining the additional costs caused by late delivery¹³ and we have no doubt that the previous contracting officer, had he been so inclined, could have made the same inquiries and could have made a reasonable forecast of the probable damages resulting from late delivery. In this fact situation, hindsight is no better than foresight in determining the damages to the Government. A reasonable inquiry would have produced the same information before award as it did after award of the contract.

In these circumstances, it cannot be said that liquidated damages in the amount of \$3 per day per valve represents a reasonable forecast of just compensation for the harm caused by late delivery. The compensation is unjust, since a delay of less than 17 days will result in the Government collecting less than the additional installation cost, while a delay of longer than 17 days will result in the contractor paying more than the amount of the Government's anticipated damages. It does not appear reasonable to expect that all delays will approximate 17

days, which is the only condition under which just compensation could be expected to occur. The liquidated damages clause herein makes it progressively more costly to the contractor for each day's delay, while the harm to the Government may easily be foreseen as not progressive at all, but a fixed amount.

We find that the liquidated damages clause herein meets neither of the criteria for enforcement, as expressed in the Restatement and previous decisions of this Board, and is therefore unenforceable as a penalty.¹⁴ We, therefore, hold that assessment of liquidated damages thereunder is unauthorized.¹⁵

Decision

The appeal from imposition of liquidated damages in the amount of \$14,889 is sustained.

G. HERBERT PACKWOOD,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

SHERMAN P. KIMBALL,
Administrative Judge.

¹⁴ In reaching this decision, we specifically make no finding as to the validity of any other liquidated damages clause which sets a fixed amount per item per day. In other circumstances, such a measure may well represent a reasonable forecast of anticipated damages which are difficult to estimate in advance.

¹⁵ The Government, however, is not precluded from seeking its common law remedy of recovering its actual damages. See *Allis-Chalmers Manufacturing Co.*, IBCA-796-8-69, 77 I.D. 74 (1970), 70-1 BCA par. 8279, n. 14 at p. 38,486.

¹¹ See *Graybar Electric Company, Inc.*, IBCA-773-4-69 (February 12, 1970), 70-1 BCA par. 8121.

¹² *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *American Ligurian Co., Inc.*, IBCA-492-4-65, 73 I.D. 15 (1966), 66-1 BCA par. 5326.

¹³ Tr. 31, 34, 35.

December 2, 1974

ARMCO STEEL CORPORATION*Factual and Procedural
Background***3 IBMA 416**

Decided December 2, 1974

Appeal by Armco Steel Corporation from a decision by an Administrative Law Judge (Docket No. HOPE 73-398-P), dated August 15, 1974, assessing civil monetary penalties in the amount of \$210 for three violations pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969¹ hereinafter the "Act."

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Reasonableness

A penalty assessment of \$210 for three violations involving the ineffective grounding of direct current mining equipment and related components is not excessive even though, when considering the statutory criteria of section 109(a) of the Act, the Judge found that the operator was not negligent, but nonetheless found the violations serious.

APPEARANCES: William C. Payne, Esq., for appellant; Armco Steel Corporation; Richard V. Backley, Esq., Assistant Solicitor, and Madison McCulloch, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal involves three section 104(b) Notices of Violation issued by a Mining Enforcement and Safety Administration (MESA) inspector to Armco Steel Corporation (Armco) for alleged violations of 30 CFR 75.703-3, 30 CFR 75.703, and 30 CFR 75.703-3(d)(6). All three alleged violations are concerned with the grounding of direct current mining equipment and related components.

In his decision the Judge found that (1) Armco was employing the silicon diode method of grounding offtrack direct current mining equipment; (2) although Armco was carrying out the weekly tests of the silicon diode systems as required by 30 CFR 75.512-2, and the tests performed within 7 days prior to issuance of the above Notices indicated that the equipment involved was effectively grounded, at the time of inspection the equipment was not effectively grounded thus violating section 308(1) of the Act and the above-cited Regulations; (3) no disabling injury or fatality had resulted from a similar violation in the past; (4) Armco was without negligence; (5) the violations were serious due to the potential electric shock hazard; (6) Armco demonstrated good faith in rapidly abating the alleged violation; and (7) the penalty assessed would not affect Armco's ability to continue in business. Based upon the

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

foregoing findings, the Judge assessed penalties in the amount of \$210 for these three violations.

In its brief on appeal, Armco contended that the amount assessed for these violations is excessive due to absence of negligence on the part of Armco. It did not object to the findings that the violations occurred.

Issue Presented

The sole issue presented for review is whether a penalty assessment of \$210 for three violations of the Act is excessive where the Judge found that the operator was not negligent.

Discussion

In reviewing the record in the instant case, we note that the Judge made specific findings of fact concerning each of the six statutory criteria of section 109(a) of the Act. In determining the penalty to be assessed for these three violations, he stated in his conclusions of law, "[a]bsent evidence to the contrary, the Judge finds no negligence on the part of the Respondent [Armco] but nonetheless, does find the violations to be serious." The Judge then assessed a penalty in the amount of \$210 for these violations.

[1] Having reviewed the record and considered the briefs of both parties, we find that Armco has not demonstrated any persuasive reason why the findings of fact, conclusions of law, made by the Judge should not be affirmed or that the amount assessed is unreasonably high. The

record indicates that the Judge fully and fairly considered all the arguments and evidence advanced by Armco, and that in arriving at the penalty assessment he fully considered the six statutory criteria of section 109(a) of the Act. Accordingly, this Board will not disturb the Judge's decision and order in this case.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED and that Armco Steel Corporation pay the penalty assessment in the amount of \$210 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

**ADMINISTRATIVE APPEAL OF
HENRY KOCER GARNETT, OS-3667**

v.

**AREA DIRECTOR, ABERDEEN, AND
ALL OTHER PARTIES IN INTEREST**

3 IBIA 180

Decided December 5, 1974

Appeal from a decision of the Area Director, Aberdeen, concerning reputa-

OS-3667 v. AREA DIRECTOR, ABERDEEN, AND ALL

OTHER PARTIES IN INTEREST

December 5, 1974

chase rights under the Act of August 8, 1968 (82 Stat. 663), and 25 CFR 257.

Affirmed.

1. Statutory Construction: Generally

Statutes should be given their natural meaning and receive a fair and reasonable interpretation with respect to the objects and purposes thereof.

APPEARANCES: Henry Kocer Garnett, appellant, pro se.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The appeal of Henry Kocer Garnett, hereinafter referred to as appellant, is from a decision of the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, denying his claim as a former owner to purchase a greater share in three tracts of land hereinafter described than the other four former owners pursuant to the Act of August 8, 1968 (82 Stat. 663), hereinafter referred to as the Act, and 25 CFR 257.

The lands involved in this appeal were a part of the lands acquired in 1942 by the United States of America as a part of the Badlands Air Force Gunnery Range, sometimes referred to and known as Pine Ridge Aerial Gunnery Range. Several years ago the Department of the Air Force declared a greater portion of the gunnery range sur-

plus or excess to its needs. The surplus or excess land, which includes the three tracts involved in this appeal, was transferred to the jurisdiction of the Secretary of the Interior, effective as of August 23, 1969. Thereafter, regulations were promulgated and approved by the Secretary of the Interior on June 24, 1969, to implement the Act of August 8, 1968, *supra*. The implementing regulations appear in 25 CFR 257.

The appeal herein involves repurchase rights under the Act, *supra*, in the following tracts of land:

AGR Tract No. B-1014, formerly the allotment of Charles Garnett, OS-3671, described as the SE $\frac{1}{4}$ sec. 1, Township 41 N., range 41 W., 6th P.M., Shannon County, South Dakota, containing 160 acres, more or less.

AGR Tract No. 1300, formerly the allotment of William Garnett, Sr., OS-1601, described as lots 1, 2, E $\frac{1}{2}$ NW $\frac{1}{4}$, sec. 7, Township 41 N., range 40 W., 6th P.M., Washabaugh County, South Dakota, containing 154.40 acres, more or less.

AGR Tract No. C-1304, formerly the allotment of William Garnett, Jr., described as lots 6, 7, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ sec. 6, Township 41 N., Range 40 W., 6th P.M., Washabaugh County, South Dakota, containing 314.25 acres, more or less.

Title to the above-described tracts vested in the United States of America as of December 31, 1942, the date of taking. Prior and up to

that date, December 31, 1942, the record indicates the United States held the three tracts of land in trust for the following Indian owners in the proportions indicated:

Filla Garnett, also known as Filla Janis Garnett, Pine Ridge Allottee No. 1830—1/3 or 9/27.

Charles Garnett, Pine Ridge Allottee No. 3734—2/9 or 6/27.

Henry Kocer Garnett, Pine Ridge Allottee No. 3667—2/9 or 6/27.

Add Theodore Garnett, Pine Ridge Allottee No. 7213—2/27.

Frances E. Garnett, Pine Ridge Unallotted No. 9555 (also known as Frances Garnett Hogan and now known as Frances Garnett Puskar)—2/27.

Cynthia Bertha Garnett, Pine Ridge Unallotted No. 9556 (also known as Cynthia Garnett Red Owl and now known as Cynthia Garnett Lawrence)—2/27.

Three of the above-named Indian owners, namely Filla Janis Garnett, Charles Garnett and Add Theodore Garnett, died prior to August 8, 1968, the date of the Act, *supra*. Accordingly, their repurchase rights vested in the parties hereinafter identified and designated under the provisions of the Act, *supra*, as implemented by 25 CFR 257.3(b) and (c). Three of the original owners, as of the date of taking, namely Henry Kocer Garnett, Pine Ridge No. 3667, Frances E. Puskar, Pine Ridge Unallotted No. 9555, and Cynthia Bertha Lawrence, Pine Ridge Unallotted No. 9556, are living and therefore

"former owners" under 25 CFR 257.3(a). Accordingly, as of August 8, 1968, the approval date thereof, the following persons qualified under the regulations as "former owners" with the right to repurchase the three tracts in question provided they filed timely applications:

Henry Kocer Garnett, PR-3667.

Frances Garnett Puskar, PRU-9555.

Cynthia Garnett Lawrence, PRU-9556.

Edith Little Bear, PR-3782.

Alice O'Rourke, PR-7874.

Charles Garnett, PRU-11009.

Anthony James Garnett, PRN-60900.

Gary Anthony Garnett, PRN-60901.

Only the following five individuals of the above eight qualified or eligible individuals filed applications to repurchase the tracts in question pursuant to 25 CFR 257.6 (a):

Henry Kocer Garnett, PR-3667.

Cynthia Garnett Lawrence, PRU-9556.

Edith Little Bear, PR-3782.

Alice O'Rourke, PR-7874.

Charles Garnett, PRU-11009.

The record indicates the five individuals were notified on November 8, 1973, by the Acting Superintendent, Pine Ridge Agency, by certified mail, return receipt requested, that unless they could agree to the share each was to acquire in the three tracts, the applications to purchase would not be considered and the tracts made available for lieu selection.

The appellant under date of December 20, 1973, in response to the letter of November 8, 1973, advised the Aberdeen Area Office it was his contention that he was legally en-

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OTHER PARTIES IN INTEREST

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titled to repurchase a 7/18 interest in the three tracts rather than an undivided $\frac{1}{5}$ interest. The appellant based his contention on the normal rules of heirship descent that would have taken place if the land had remained in Indian ownership. In response thereto, the Area Director on January 11, 1974, advised the appellant that he was reaffirming his position to the effect that any right the appellant had to repurchase was created by the Act of August 8, 1968, *supra*, and that his right under the Act, *supra*, to repurchase was no greater than the right of the other four applicants. The appellant was further advised that if he and the other four applicants could agree to acquire the tracts in other than equal undivided shares or interests of $\frac{1}{5}$ each, a sale in the proportions agreed would be made. In the same letter appellant was further advised the responsibility of reaching an agreement as to the shares or interests to be purchased by each applicant rested entirely with such individuals. Moreover, the appellant was given an additional 30 days from the date of the letter to execute sales contracts and failure to do so would result in the proposed purchase being abandoned and the lands made available for lieu selection.

The record indicates the appellant upon receipt of the letter of January 11, 1974, still remained unconvinced and maintained he was legally entitled to acquire a larger

share in the three tracts than the other four applicants and advised the Aberdeen Area Office to that effect on January 28, 1974. The Aberdeen Area Office treated the letter as an appeal and referred the matter to the Commissioner, Bureau of Indian Affairs, for review and decision. The Commissioner, pursuant to 211 DM 13.7, dated December 14, 1973, referred the matter to the Board of Indian Appeals for disposition.

The appellant in support of his appeal contends that:

(1) William Garnett, Sr., was the original owner of the tracts involved and since his wife, Filla, and all his children, with the exception of the appellant, are deceased, preferential repurchase rights should vest in the appellant as a sole surviving child, and

(2) appellant, as a son, applied for and was granted the right to repurchase other lands that had been owned by Filla Garnett and taken by the government and that the appellant should have the same right to repurchase the lands taken over from William Garnett, Sr., as the only surviving son, and

(3) appellant owns a 5/9 interest in the tracts involved as compared to the outstanding 4/9 interest owned by seven other persons in various proportions, and

(4) by virtue of custom and usage, appellant has a vested right to purchase such property since he was born on the land, lived thereon until

the land was taken by the U.S., and that he moved back on the land after the military quit using the land in 1945.

(5) that the appellant has expended approximately \$50,000 in improving the premises.

(6) that appellant uses the tract involved as headquarters for his operations consisting of other interests he has acquired in the vicinity.

A review of the record indicates the appeal involves only one issue that requires consideration and resolution by this Board and that is:

Does the Act of August 8, 1968, as implemented by 25 CFR 257 provide for the appellant, a former owner, to purchase a greater share in the tracts involved than the other four former owners?

The appellant's contentions as hereinabove set forth are considered and disposed of as follows:

Appellant's first contention is clearly without merit as William Garnett, Sr., was not a "former owner" within the meaning of 25 CFR 257.3(e) which provided in its pertinent part:

* * * "Former owner" means each person from whom the United States acquired an interest in a tract of land, or if such person is deceased, the surviving spouse, or if such spouse is deceased, his children. * * *

Contention number 2 is likewise without merit as it is immaterial and of no consequence insofar as the three tracts in question are concerned that appellant applied for and was granted the right to repurchase other lands owned by Filla Garnett which had been taken by

the government as part of the gunnery range.

Appellant's third contention is unsupported by the record in that title to the three tracts still remains in the United States of America. Moreover, the only right the appellant and the other four former owners have in the land in question is what is granted them under the Act of August 8, 1968, *supra*, that being merely the right to repurchase the land in question under the conditions set forth in the Act, *supra*, as implemented by 25 CFR 257.

The appellant's fourth contention is likewise without merit and unacceptable in that the Act, *supra*, as implemented by the regulations, 25 CFR 257, makes no provision for the consideration of custom and usages or for the other items mentioned by the appellant in his contentions regarding repurchase rights. Regrettable and unfortunate as it may be, any investment or improvements the appellant made on the lands involved in this appeal were strictly at his own risk.

The record indicates that appellant and the other four parties have qualified as "former owners" as to the three tracts and in such capacity made timely applications to repurchase the three tracts involved pursuant to 25 CFR 257.6(a). Title 25 CFR 257.3(e), among other things, provides that not more than five of the former owners may join in purchasing a tract of land. Neither the Act, *supra*, nor Part 257 of the regulation makes any provision for

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the former owners under such circumstances to acquire anything other than equal interest or shares therein.

[1] Statutes as a general rule should be given their natural meaning and receive a fair and reasonable interpretation with respect to the objects and purposes thereof. The words of the statute will be given their plain meaning where to do so does not lead to an absurd or unjust result. *H. Leslie Parker, M. N. Wheeler*, 62 I.D. 88 (1955).

In view of the reasons hereinabove set forth, the Board finds that the appellant under the provisions of the Act of August 8, 1968, *supra*, and 25 CFR 257, is not entitled to purchase a greater share or interest in the three tracts involved than the other four applicants. Accordingly, the Area Director's decision of January 11, 1974, affirming the Pine Ridge Acting Superintendent's action of November 8, 1973, must be sustained and appellant's appeal dismissed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, issued December 14, 1973, and 43 CFR 4.1(2), the decision of the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, dated January 11, 1974, be and the same is hereby **AFFIRMED** and the appeal herein is **DISMISSED**.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

UNITED STATES

v.

MIKE GUZMAN, SR. AND
MIKE GUZMAN, JR.

18 IBLA 109

Decided December 5, 1974

Appeal from decision of Chief Administrative Law Judge L. K. Luoma declaring the Queen and Driftwood placer mining claims null and void.

Affirmed in part, set aside in part and remanded.

1. Mining Claims: Withdrawn Land

Mining claims located subsequent to a first-form reclamation withdrawal are void *ab initio*, since such lands are closed to entry under the general mining laws.

2. Mining Claims: Lode Claims—Mining Claims: Placer Claims

Lode claims located for deposits of sand and gravel are void *ab initio*, since the law authorizing the location of lode claims provides no authority for the location of placer deposits of sand and gravel, and a relocation of the lode claims as placer claims in 1965 cannot relate back to and depend upon the lode claims for validity.

3. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Common Varieties of Minerals: Special Value—Mining Claims: Common Varieties of Minerals: Unique Property

A deposit of sand and gravel used for ordinary purposes may be considered an uncommon variety of such material only if the deposit will command an economic advantage over ordinary deposits of sand and gravel due to a unique property which imparts the special and distinct value to the deposit.

4. Mining Claims: Common Varieties of Minerals: Generally

Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. When the evidence shows that other deposits occur commonly in the area and are similarly used, the fact that the subject deposit has qualities which are particularly well suited to that purpose does not, of itself, alter its essential character as a common variety material.

5. Mining Claims: Common Varieties of Minerals: Generally

Where a particular mineral material is common, abundant and widespread, certain deposits are bound to exist in closer proximity to the market than other such deposits, but this is only an extrinsic factor which does not make the material any less common.

6. Mining Claims: Lands Subject to—Mining Claims: Special Acts—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

R.S. 2332, 30 U.S.C. § 38 (1970), is not an independent adverse possession statute. It is part of the general mining laws, and necessarily assumes that any lands claimed under that statute were open to entry and patent under the mining laws. It has no application to a trespass on

land which is closed to mineral entry by withdrawal or reservation, and compliance with the terms of the statute will not "cure" the invalidity of a mining claim located on land which was not open to entry and appropriation under the mining laws.

7. Mining Claims: Generally—Mining Claims: Location—Mining Claims: Special Acts

Technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to R.S. 2332, 30 U.S.C. § 38 (1970). The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, and a claimant under this provision is not required to produce record evidence of his location or to give any reason for not producing such evidence.

8. Mining Claims: Generally—Mining Claims: Location—Mining Claims: Special Acts

If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety of mineral thereon at a time when both the land and the mineral were subject to appropriation under the mining laws, and if they thereafter remained in peaceful, exclusive possession and openly worked the claim for the period prescribed by the state statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the improvement of the claim, all such actions having been accomplished prior to July 23, 1955, they have thereby established their right to receive a patent pursuant to 30 U.S.C. § 38 (1970) notwithstanding their failure to file a location notice initially and despite their error in subsequently locating and recording their claim under the statute pertaining to lode locations

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rather than properly under the placer mining law.

9. Administrative Procedure: Generally—Appeals—Evidence: Generally—Contests and Protests: Generally—Hearings

Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. § 38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, Department of Agriculture, Albuquerque, New Mexico, for appellee; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Mike Guzman, Sr., and Mike Guzman, Jr., have appealed from the March 12, 1974, decision of Chief Administrative Law Judge L. K. Luoma holding that the Queen and Driftwood placer mining claims are null and void.¹ That decision resulted from contest proceedings initiated by the Bureau of Land Management at the request of the Forest Service. The contest

complaint charged, *inter alia*, that there had been no discovery of a valuable mineral deposit on the claims. The complaint further charged that the sand and gravel found on the claims are a common variety of sand and gravel within the meaning of section 3, of the Act of July 23, 1955, *as amended*, 30 U.S.C. § 611 (1970), and consequently, not subject to location under the general mining laws, 30 U.S.C. § 21 *et seq.* (1970).

The first issue is the date of the location of these claims. If they were validly located prior to July 23, 1955, then the sand and gravel on the claims may constitute a valuable mineral deposit locatable under the U.S. mining laws, even if that material is a common variety of sand and gravel. If, however, the claims were not located until after July 23, 1955, then the claims cannot be valid unless the sand and gravel found thereon is an uncommon variety of that material. 30 U.S.C. § 611 (1970).

Appellants assert that they located both the Queen and Driftwood claims in 1941, but did not record them. Appellants testified that they have removed sand and gravel deposits along the channel of Queen Creek from an area between both claims since 1941 (Tr. 134). Appellants then located two lode claims on April 14, 1955, known as the Queen and Driftwood lode claims. In 1965, they located the present Queen and Driftwood placer mining claims for the same deposits of

¹ The Queen and Driftwood placer mining claims are located in sections 3 and 2, respectively, T. 2 S., R. 11 E., GSR Meridian, Tonto National Forest, Arizona. Both claims are situated in the bed of Queen Creek.

sand and gravel. Finally, in 1966, as the result of a contest proceeding, the lode claims were declared null and void by a Hearing Examiner. An appeal of this decision to the Director, Bureau of Land Management was dismissed, and no further appeal was taken in this case.

[1] Appellants argue that the 1965 location of the placer claims should relate back to the original locations, or at least to the 1955 lode locations. That argument is untenable. First, with respect to both the Queen placer and the Queen lode, the land on which they are located was removed from mineral entry by a first-form reclamation withdrawal in 1925 (Ex. 7). See *M. G. Johnson*, 78 I.D. 107 (1971). The land was not reopened to mineral entry until 1963, PLO 2897, 28 FR 1045 (1963). Mining claims located on lands withdrawn from entry are void *ab initio* and gain the locator no rights either at the time of location or at any later date. *Mickey G. Shanlis*, 11 IBLA 116 (1973); *Frank Zappia*, 10 IBLA 178, 183 (1973). Moreover, the Queen placer cannot be regarded as an amendment of the Queen lode because the placer claim occupies entirely different land at some distance from the lode location, involving different workings. The two claims are unrelated. Therefore the first potentially valid location of the Queen placer mining claims took place in 1965.

[2] The Driftwood lode claim was located in part on withdrawn

lands. That portion of the claim is also void. The Driftwood placer does embrace part of the same land and workings which were formerly claimed under the Driftwood lode location. However, the entire Driftwood lode claim is void for another reason: the claim was located as a lode claim and not as a placer. One of the most fundamental distinctions in mining law is the distinction between placer deposits and lode deposits. Lode deposits are defined by statute as “* * * veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *” 30 U.S.C. § 23 (1970). See e.g., *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912). Placer deposits are likewise defined by statute as all mineral deposits other than lodes. 30 U.S.C. § 35 (1970). The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a vein or lode in rock in place, it may be secured by a placer claim, and may not be by a lode claim. *Webb v. American Asphaltum Mining Co.*, 157 F. 203 (8th Cir. 1907). The most typical example of a placer deposit is a deposit of sand and gravel. See e.g., *A Dictionary of Mining, Minerals, and Related Terms* 829 (1968) and *Webster's New International Dictionary*, 1877

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(2d ed. 1949). It is also a fundamental rule of mining law that placer deposits are subject to location and patent only under the law applicable to placer claims. *Henderson v. Fulton*, 35 L.D. 652, 663 (1907); see also *Cole v. Ralph*, 252 U.S. 286, 295 (1920); *Helen V. Wells*, 54 I.D. 306 (1933); *United States v. Stevens*, 77 I.D. 97, 103 (1970). Likewise, a lode discovery will not sustain a placer mining location. *Big Pine Mining Corp.*, 53 I.D. 410 (1931). Therefore, both the Driftwood and Queen lode claims were invalid from their inception for the reason that sand and gravel are locatable only under the law pertaining to placer deposits. *Layman v. Ellis*, 52 L.D. 714, 722 (1929). Since both the Queen and Driftwood lode claims have been invalid from their inception, their relocation as placer claims in 1965 cannot relate back to and depend upon the lode claims for validity.

[3] The Act of July 23, 1955, 30 U.S.C. § 611 (1970), amended the Materials Act of 1947, 30 U.S.C. § 601 (1970), to provide that:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

The purpose of that Act has been stated by the Supreme Court in *United States v. Coleman*, 390 U.S. 599, 604 (1968):

* * * The legislative history makes clear that this Act (30 U.S.C. § 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. § 601, which provides for the sale of such materials without disposing of the land on which they are found. * * *

Appellants have pointed out that one of the principal reasons why Congress wanted common varieties of sand, gravel, and building materials to be removed from entry under the general mining laws was to prevent certain widespread abuses that occurred under that mining law. In particular, Congress wished to prevent people from acquiring lands valuable for recreation, timber, and wildlife based on discovery of common varieties of certain materials, when, in fact, the locators of those materials had no intention of ever mining them, but simply wanted a site for a cabin or other nonmining purposes. See, e.g., 1955 *U.S. Code Cong. & Ad. News* 2477. Conceding that this was one of the purposes of the Act of July 23, 1955, it is nevertheless clear that after that date, no deposit of a common variety of sand and gravel could be located under the general mining law. Consequently, in order for the Queen and Driftwood placer claims

to be valid, the sand and gravel deposits found thereon must not be a common variety of sand and gravel, because they were located in 1965, ten years after common sand and gravel was closed to appropriation under the mining law.

The various tests developed by the Secretary of the Interior to determine whether a particular deposit is an uncommon variety of sand, gravel, or building stone has been summarized by the Court of Appeals for the Ninth Circuit: (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special economic value may be reflected by the higher price which the material commands in the marketplace, or by reduced cost or overhead so that the profit to the producer would be substantially more. *McClarty v. Secretary of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969).

In addition to those guidelines for determining whether a material is a common variety, the mining claims, to be considered valid, would have to meet the normal tests of validity for any mining claim. Essentially, the mineral deposit found on the claim must be reasonably perceived to be capable of extraction,

removal, and marketing at a profit. See *United States v. Coleman*, *supra*. When the United States contests a mining claim, it has the burden of presenting a *prima facie* case that the claim is invalid. The burden then shifts to the claimant to show by a preponderance of the evidence that the claim is valid, for it is the claimants who are the proponents of an order to declare their claim valid. *United States v. Springer*, 8 IBLA 123 (1972), *aff'd.*, 491 F.2d 239, 242 (9th Cir. 1974), *cert. denied*, — U.S. — (1974); *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

The testimony regarding the extent of utilization and marketability of the material found on these claims is both sketchy and conflicting. (Tr. 66, 67, 94, 96, 220.) (Ex. L, M, R.) Nevertheless, it is clear that for some thirty years the appellants have been selling the sand and gravel from the area of these claims, both separately and as an ingredient in their ready-mix concrete. While actual mining operations are not required to prove marketability, we have held that actual profitable mining operations are the best evidence of a valuable mineral deposit. *United States v. McKenzie*, 4 IBLA 97, 100 (1971). Since the appellants have a profitable ongoing mining operation, the marketability of the deposit in question is fairly obvious.

Appellants have compared the sand and gravel found on their claims with other sand and gravel deposits found in this area. Appellants assert that the characteristic

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which makes this deposit of sand and gravel unique is the angularity of the particles (Tr. 226). They attribute this unusual angularity to both the sand and the gravel. The appellants' assertion as to the uniqueness of the deposit was corroborated by both of appellants' expert witnesses (Tr. 263, 278). Both appellants and their expert witnesses testified that the angularity of the gravel and also the absence of deleterious materials associated with the deposit combine to make an excellent "high test concrete." (Tr. 226, 263, 285.) The only example of what was meant by "high test" or "high grade" concrete was the suggestion that appellants' concrete could be used for lining mine shafts (Tr. 226, 286). However, the government's mineral examiner testified that while the sand and gravel was well suited for making concrete used for lining mine shafts, such concrete was not as permanent as that used in dams (Tr. 92). At any rate, the use of material for construction purposes is only a common use. *United States v. Henderson*, 68 I.D. 26, 29 (1961). And for material used only for common purposes to be considered an uncommon variety, it must have some special and distinct value in an economic sense over and above the common run of such material. *McClarty v. Secretary of the Interior*, *supra*.

The only evidence offered by appellants which suggests some special value are statements by Mike Guzman, Jr., and by an expert wit-

ness, Dudley L. Davis. Guzman testified that for some grades of concrete mixes, appellants receive "roughly" one dollar more per cubic yard than competitors receive, although he could not make specific comparisons with his competitors' prices because, " * * * there's so many mixes and all that that would be hard to tell * * * " (Tr. 232, 233.) However, in some areas, the price appellants receive is the same as the competitor's price (Tr. 233). Guzman also testified that his company had been awarded contracts despite the fact that competitors had underbid his price by offering to sell concrete at a lower price per yard. However, a number of factors other than the physical peculiarities of Guzmans' sand and gravel may have influenced the buyer's decision in these instances, such as the Guzmans' size, reliability and reputation, as compared to the low bidders'. Or, their competitors' product may be sub-standard without establishing that material from the Guzman claims is an uncommon variety. One of appellants' expert witnesses stated one user was "willing to pay a little more" for a better grade of concrete (Tr. 287). Other than those statements, there is not one shred of evidence to indicate that appellants ever actually received more for their concrete than any of their competitors. Appellants did not produce a single receipt showing that they received more than a competitor, nor did they introduce any witness who

would state that he had paid more for appellants' concrete than for a competitor's.² The only evidence in the record related to specific sales was for a period prior to the 1965 location of these claims (Exs. L, M). And that evidence (Ex. M), indicates that the sales were made mostly to private individuals or small companies. Consequently, it seems reasonable to infer that for that period, and probably for the period following it, most sales of concrete were to private users, for ordinary purposes, for which the appellants received an ordinary price. While the evidence does establish that this material is suitable for making high quality concrete, it is not sufficient to show that this is so unique or unusual as to warrant a finding that the material is an uncommon variety.

[4] Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose

² Appellants did submit two letters (Exs. T, U) from two customers stating that they preferred to use appellants' sand and gravel for concrete, because they considered it to be of high quality. There was no assertion that there was any economic advantage to using appellants' sand and gravel. Further, both letters are unreliable hearsay, as was the one statement made by appellants' expert witness that one user was willing to pay a little more for concrete hauled a farther distance (Tr. 287). Since appellants did not call these customers as witnesses, and consequently, there was no chance for cross-examination, we regard the statements as having little weight.

and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare. *United States v. Ligier*, A-29011 (October 8, 1962); *United States v. Shannon*, 70 I.D. 136 (1963). This Board held similarly with reference to a deposit of cinders in *United States v. Harenberg*, 9 IBLA 77 (1973), stating:

A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Likewise, the Department has consistently held that deposits of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, non-reactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are, nonetheless, a common variety of sand and gravel. *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968); *United States v. Ramstad*, A-30351 (September 24, 1965); *United States v. Basich*, A-30017 (September 23, 1964); *United*

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States v. Hensler, A-29973 (May 14, 1964); *United States v. Henderson*, *supra*.

The angularity of this sand and gravel is attributed to the fact that it has not been carried as far from its source by the action of the stream and, accordingly, it has been subject to less wear than have other such deposits in the area. While this may well make it more desirable for use as a concrete aggregate than other nearby deposits used for the same purpose, we cannot agree that it is a unique quality.

[5] Further, we have repeatedly held that a deposit of otherwise common sand and gravel cannot be regarded as an uncommon variety on the basis that the deposit enjoys an economic advantage due to its proximity to the market. Where a particular mineral material is common, abundant and widespread, certain deposits of that material are bound to exist in closer proximity to the market than other such deposits, but this is only an extrinsic factor which does not make the material any less common. *United States v. O'Callaghan*, 8 IBLA 324, 79 I.D. 689 (1972); *United States v. Stewart*, 5 IBLA 39, 79 I.D. 27 (1972); *United States v. Bedrock Mining Co.*, 1 IBLA 21 (1970).

[6] Appellants contend that they are entitled to receive a patent to the two placer claims on the basis of their compliance with 30 U.S.C. § 38 (1970) which provides, in pertinent part, as follows:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim; * * *.

Appellants maintain that this statute operates to invest them with title despite the fact that most of the land claimed was withdrawn from entry under the mining law, citing *Belk v. Meagher*, 104 U.S. 279 (1881). However, a reading of that case discloses that no withdrawal was involved.

The assertion that one may enter upon land which has been withdrawn from entry, effect a discovery thereon and possess such land for the period prescribed, and thus "cure the defective title of a location made on withdrawn land" is wholly untenable. Although *Belk v. Meagher* is not a case involving an entry on withdrawn land, some of the statements in the Court's opinion are instructive concerning the effect of such an entry, saying, at 284:

* * * The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. * * *

Probably the most definitive analysis of 30 U.S.C. § 38 by the Supreme Court is found in *Cole v. Ralph*, 252 U.S. 286 (1920), in which the Court, at page 306, quotes with approval from the Secretary's decision in an earlier case, as follows:

"The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being *in pari materia* with the other sections of the Revision concerning such claims is to be construed together with them, and so, if possible, that they may all stand together, forming a harmonious body of mining law." *Barklage v. Russell*, 29 L.D. 401, 405-406.

The plain meaning of the foregoing is that 30 U.S.C. § 38 was enacted as part of the general mining laws and not as an independent adverse possession statute. It follows that section 38 is operative only as to those lands which are open to location under the general mining laws. In *United States v. Midway Northern Oil Co.*, 232 F. 619, 634 (D. Calif. 1916), the Court held as follows with reference to 30 U.S.C. § 38 (R.S. 2332):

* * * This is not a statute of limitations. It is a part of the chapter on Mineral and Mining Resources, and prescribes the evidence sufficient to establish the right of one who has possessed and worked a mining claim to a patent. It necessarily assumes that the lands were open to entry and patent under the mining laws. * * * it manifestly can have no application to a trespasser on land the title to which cannot be acquired under

the law of the United States. The defendants' entry and possession was after the withdrawal order, and initiated no rights as against the government which could ripen into a title or a right to a patent.

More recently, section 38 was held not to apply to land closed to entry under the mining law in the case of *United States v. Consolidated Mines and Smelting Co.*, 455 F. 2d (9th Cir. 1971). This Board likewise so held in *Merritt N. Barton*, 6 IBLA 293, 79 I.D. 431 (1972).

Based upon all of the foregoing, we conclude that:

(1) All of the material with which we are here concerned is common variety sand and gravel not subject to location after July 23, 1955.

(2) All of the material occurs in placer form rather than in lode form.

(3) Lode locations will not support a claim to deposits of placer minerals.

(4) The Queen placer claim cannot be regarded as an amendment of the Queen lode claim because the two claims occupy entirely different tracts of lands.

(5) The Queen lode claim, the Queen placer claim and the north portion of the Driftwood lode claim (approximately one half of the claim) are null and void *ad initio* because the withdrawal, which was imposed in 1925 and not revoked until 1963, precluded any appropriation of this land at any time when deposits of sand and gravel were subject to location under the mining law.

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(6) 30 U.S.C. § 38 (1970) does not invest claimants with a right to receive a patent to lands which were closed to entry under the mining law at the time they took possession.

(7) To the extent that the location of the Driftwood placer claim occupies more land outside of the Driftwood lode claim than the minimum necessary to conform the old lode location to an aliquot part of a subdivision of the rectangular survey system, it is a location of new lands not previously claimed, possessed and occupied, and therefore void, as no new lands may be located for common sand and gravel after July 23, 1955.

(8) The land within the Driftwood lode claim which was outside the withdrawn area and not included in the 1965 location of the Driftwood placer claim was eliminated from further consideration by the final decision of this Department in 1966 which held that the lode claim was null and void.

Having thus disposed of the Queen lode and Queen placer claims in their entireties, and with portions of the Driftwood lode and Driftwood placer claims, we are confronted with the question of the validity of the only remaining area, *i.e.*, that land outside the boundary of the withdrawal and within the limits of both the old Driftwood lode claim and the Driftwood placer claim. This area comprises something less than ten acres in its present configuration. (See Exhibit 13.)

In the decision below, the Admin-

istrative Law Judge did not deal separately with this tract. Instead, he merely found, as we have, that the location of a lode claim will not support a claim to a placer deposit, and that the location of the Driftwood placer claim was initiated long after the time when common sand and gravel was subject to such location. On this basis he held that the entire Driftwood placer claim was null and void.

[7] However, appellants argue that technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to 30 U.S.C. § 38 (1970). To the extent that such claims relate to lands and minerals which are subject to location under the mining laws, we agree. The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, for if the claimant could prove that he would have no need of section 38, and it must be presumed that in enacting this provision the Congress did not intend a vain and needless thing.

An examination of the history of the provision suggests that, indeed, one of its purposes was to regularize the possession of placer deposits by claimants who had entered, located, held and worked such deposits under the law relating to lode claims before the enactment of the statute which authorized placer locations. The provision was, in fact, originally enacted as section 13 of the

Act of July 9, 1870 (16 Stat. 217), commonly known as "The Placer Act," and was brought forward into the Revised Statutes without any material change of language. See *Barklage v. Russell*, 29 L.D. 401, 405 (1900). There was early judicial recognition that the section could be employed in proper cases to excuse a claimant's inability to demonstrate strict compliance with the other provisions of the mining laws and to create a presumption that claim was properly located. In *Harris v. The Equator Mining and Smelting Co.*, 8 F. 863 (C.C.D. Colo. 1881), the Court said:

*** Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession; not on the ground that the essentials of a valid location are in any case to be omitted, but that in support of undisturbed possession, long enjoyed, *a presumption may in some cases arise that the location was at first well made.* The statute of limitations enacted by the state and recognized in the act of congress, is founded on this principle. *** (At 865) (Italics added).

*** A presumption is indulged that the location was regularly made in the

first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. *The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling.*

*** (At 866) (Italics added).

Courts of the several public domain states have apparently experienced little difficulty in concluding that this section obviates the necessity of the claimant's proving the validity of the initial location where he possesses the necessary qualifications as to citizenship, has lawfully entered, effected a discovery, performed his annual assessment work, and worked the claim for the prescribed period. See, e.g., *Eagle-Picher Mining and Smelting Co. v. Meyer*, 204 P.2d 171 (Sup. Ct. Arizona 1949); *Judson v. Herington*, 162 P.2d 931 (C.A. Calif. 1945); *Oliver v. Burg*, 58 P.2d 245 (Sup. Ct. Oregon 1936); *McLean v. Ladewig*, 37 P.2d 502 (C.A. Calif. 1934); *Dalton v. Clark*, 18 P.2d 752 (C.A. Calif. 1933) (mill site); *Humphreys v. Idaho Gold Mines Development Co.*, 120 P. 823 (Sup. Ct. Idaho 1912); *Upton v. Santa Rita Mining Co.*, 89 P. 275 (Sup. Ct. New Mexico 1907). In a Utah case the Court held that section 38 could be invoked in favor of a claimant who had entered land available only for placer claims and attempted several lode locations, had worked the building stone deposit for 20 years and expended large sums of money in open and exclusive possession prior to plaintiff's attempt to locate the ground

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as a placer claim. *Springer v. Southern Pacific Co.*, 248 P. 819 (Sup. Ct. Utah 1926). In that case the Court said the following at 823:

* * * As to whether respondent may avail itself of the provisions of section 2332, supra, however, where, as here, the attempted lode location failed because no discovery of valuable mineral was made by discovering rock in place, as that term has always been construed and applied by the courts, is, perhaps, not without some difficulty. The record in this case leaves no room for doubt that every other legal requirement except the discovery of valuable mineral in rock in place has been met by the respondent. Neither is there any doubt that an honest attempt was made by respondent to make a lode location, and that in view that no proper discovery was made no valid or legal lode location was made. Notwithstanding that fact, however, respondent has fulfilled every other legal requirement. It expended more than a half million dollars in working and making improvements on the mining claims that it had attempted to locate as lode claims, but which unfortunately constituted placer ground instead, and should have been located as placer claims. Moreover, for more than 20 years before appellants made any attempt to locate the ground as placer ground, respondent had maintained actual and exclusive possession of its claims and made permanent and valuable improvements thereon. Then, again, respondent was in actual, open, and visible possession of the claims and was developing and constantly using the only minerals contained therein when the appellants made their attempt to locate the ground as placer claims, of which respondent was in actual possession and was extracting mineral therefrom, all of which appellants knew, and for a long time prior to their attempted location had known.

Several early Departmental decisions are in accord with the proposition that a claimant who, invoking the provisions of section 38, proves that he, or his grantor, has held and worked the claim for the period prescribed, is not required to produce record evidence of his location, or to give any reason for not producing such evidence. *Capital No. 5 Placer Mining Claim*, 34 L.D. 462 (1906); *The Little Emily Mining and Milling Co.*, 34 L.D. 182 (1905); *Gaffney v. Turner*, 29 L.D. 470 (1900); *Brady's Mortgage v. Harris*, 29 L.D. 426 (1900); *Barklage v. Russell*, supra. Recent decisions of this Board have held that a finding that a claim was void ab initio by reason of having been located on withdrawn land would not dispose of the claimant's rights under 30 U.S.C. § 38 (1970) based upon his occupancy after the land was restored to entry. *Gardner C. McFarland*, 8 IBLA 56 (1972); *Merritt N. Barton*, supra.

Several of the decisions of the various state courts cited above rely upon the declaration made by the United States Supreme Court in *Belk v. Meagher*, supra, at 287, that if the claimant actually held and worked the claim for the requisite time under section 38 he would have "secured what is here made the equivalent of a valid location."

[8] Accordingly, the question presented as to the land outside the boundaries of the withdrawal and within the limits of both the old Driftwood lode claim and the Drift-

wood placer claim may be stated as follows:

If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety mineral thereon at a time when both the land and the mineral was subject to appropriation under the mining laws, and if they thereafter remained in peaceful exclusive possession and openly worked the claim for the period prescribed by the Arizona statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the improvement of the claim, all such actions having been accomplished prior to July 23, 1955, have they thereby established their right to receive a patent pursuant to 30 U.S.C. § 38 (1970) notwithstanding their failure to file a location notice initially and despite their error in subsequently locating and recording their claim under the statute pertaining to lode locations rather than properly under the placer mining law?

Although we were unable to find any case in which this precise question was previously decided by this Department,³ while the draft of this opinion was in preparation the Court of Appeals for the Ninth Circuit rendered its opinion in *United States v. Haskins*, 505 F.2d 246 (9th Cir. 1974), in which the Court treated the question and answered it affirmatively, saying:

³ The question was presented in a previous appeal to the Secretary in *United States v. Alice A. and Carrie H. Boyle* (Supp.), 76 I.D. 318 (1969), a case which bears numerous striking similarities to this case. However, that case was resolved on a finding that the claim was not supported by a discovery and no ruling was made on the issue here presented. (Judicial review pending in the Court of Appeals for the Ninth Circuit *sub nom. Morton v. Boyle*, Civ. No. 72-2690.)

* * * The District Court stated the following as the controlling questions of law involved in its decision:

"1. Can the defendant pursue his application for patent of the Haskins' Placer Mining Claim pursuant to Title 30 U.S.C. § 38 where his lode claims under which he had previously worked the property have been declared invalid for lack of discovery?

"2. Does defendant's possession of the property which antedates the effective date of the Watershed, Withdrawal Act of 1928 by more than five years, entitle him to proceed with his patent application notwithstanding the fact that his notice of intention to hold as a placer mining claim was not filed until subsequent to the effective date of the Watershed Withdrawal Act?

* * * * *

This savings clause [30 U.S.C. § 38] has been part of the general mining law since 1870 (16 Stat. 217). Its purpose is to obviate the necessity of proving formal compliance with requirements for locating a claim but not to dispense with proof of discovery. *Cole v. Ralph*, 252 U.S. 286 (1920).

We agree with the district court that the section is applicable to this case. The evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over half a century and for much longer than five years prior to the enactment of the Watershed Withdrawal Act of May 29, 1928. Section 38 permits them to assert valid placer locations for the ground in question without proof of posting, recording notices of location and the like. *Springer v. Southern Pac. Co.*, 248 P. 819 (Utah 1926); *Newport Mining Co. v. Bead Lake G.C.M. Co.*, 188 P. 27 (Wash. 1920); *Humphreys v. Idaho Gold Mines Etc. Co.*, 120 P. 823 (Ida. 1912).

* * * * *

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Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States. *Cole v. Ralph, supra*; *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920).

* * * * *

7. ANSWERS TO CONTROLLING QUESTIONS OF LAW CERTIFIED BY THE DISTRICT COURT.

(a) Haskins may pursue his application for patent of the Haskins' Placer Mining Claim pursuant to 30 U.S.C. § 38, but may not base his claim of discovery of a valuable mineral upon the presence of dolomite or dolomite limestone in lode formation.

(b) The notice of intention to hold the placer claims recorded in 1968 does not preclude Haskins from asserting the validity of the claims based on actual possession and working of the claims for more than five years prior to the Watershed Withdrawal Act of 1928, proof of posting and recording notices of placer locations at or about the date of occupancy being obviated by 30 U.S.C. § 38.

* * * * *

[9] However, the record made at the hearing of this contest falls far short of establishing that the Guzmans have indeed qualified under section 38. They have adduced evidence tending to show that they have produced sand and gravel from the vicinity of these claims since the 1940's, presumably at a profit, but it is not settled when they entered the small tract of land in question, when they effected a discovery on that tract, when they

commenced to work it, and for how long such work continued. As indicated above, the claimants must show that they had perfected their right to receive a patent pursuant to section 38 prior to July 23, 1955, because no claim for a deposit of common sand and gravel can be perfected by any means after that date.

Further evidence must be adduced relative to the claimants' compliance or non-compliance with the requirements which are essential to the establishment of a valid claim pursuant to 30 U.S.C. § 38 (1970) as to the area described above, and the case will be remanded for a hearing and decision limited to this issue.

The Administrative Law Judge was correct in his conclusion that the designated claims, as such, are wholly invalid for the reasons given in his decision. We find, however, that the claimants' right to the small area which lies within the boundaries of the Driftwood placer claim does not depend upon the validity of the location of the Driftwood placer claim or the Driftwood lode claim, but rather upon the prior use and occupancy of the land, if any, pursuant to 30 U.S.C. § 38. The only relevance of the formally located Driftwood placer and lode claims to that issue is that they serve to delineate the area which was claimed by the appellants prior to July 23, 1955, and subsequently, which may be subject to the assertion of a claim under section 38. Therefore, while we affirm the de-

cision that the Queen and Driftwood placer claims are invalid, we find that this holding does not dispose of the claimants' rights under section 38, and we must set aside the Judge's holding that the contestees did not acquire any rights to any portion of the Driftwood placer claim by virtue of 30 U.S.C. § 38 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside as to the issue delineated above and remanded for further proceedings relative to that issue, and the decision is affirmed as to all other holdings.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEAL OF COAC, INC.

IBCA-1004-9-73

Decided December 6, 1974

Contract No. 4907B10090, Yosemite National Park, D52 (CD) CSD, National Park Service.

Denied.

1. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Compensable Delays—Contracts: Performance or Default: Suspension of Work

Where, under a construction contract containing a suspension of work clause, issuance of the notice to proceed was delayed pending a decision on a protest of the award, the contractor's claim for increased costs because the delay necessitated a portion of the work being performed in the winter months was denied where the evidence failed to show a causal connection between the initial delay and performance in the winter.

2. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Damages: Generally—Contracts: Performance or Default: Acceptance of Performance

A construction contractor's claim for the costs of certain repairs allegedly directed by the contracting officer was denied where the evidence failed to establish that the methods of repair actually utilized were more expensive than methods of repair in the specification or which could reasonably have been required by the contracting officer.

3. Contracts: Construction and Operation: Modification of Contracts—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof

A construction contractor's claim that its agreement to perform certain repairs to concrete structures at no additional cost to the Government was voidable because of distress is denied where the record contains no evidence to support the allegation that the agreement was occasioned by threats of improper default termination, assessment of liquidated damages and withholding of payment.

APPEARANCES: Mr. Robert N. Katz, Attorney at Law, Park, Swaner & Leslie, San Francisco, California, for appellant; Mr. Ralph O. Canaday, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE NISSEN**INTERIOR BOARD OF CONTRACT APPEALS*

This appeal involves the contractor's (COAC's) claim for additional compensation due to delay in issuing the notice to proceed and because of additional work directed by the contracting officer to correct alleged deficiencies. Neither party having requested a hearing, the appeal will be decided on the record consisting of the appeal file and an additional submission by the Government; COAC having elected not to supplement the record or to file a brief.

Findings of Fact

The contract,¹ awarded on June 28, 1971, was in the estimated amount of \$319,982 and called for the construction of sewage pumping stations (Yosemite Creek and Camps 7 and 12), in the Yosemite Valley, Yosemite National Park, Mariposa County, California. The contract included Standard Form 23-A (October 1969 Edition) with certain amendments not pertinent here.

The work was required to be completed within 180 days after receipt of the notice to proceed. The notice to proceed was issued on August 16 and receipt thereof was acknowledged by COAC on August 18, 1971 (Item H), thereby establishing

March 16, 1972 as the completion date. The reason for the delay in issuance of the notice to proceed will hereafter appear. By various change orders the completion date was extended to the close of business on December 1, 1972. The work was apparently accepted subject to correction of punch list items on July 5, 1972 (letter dated August 2, 1972, Item T).

Delay in Issuing Notice to Proceed

The invitation, issued on May 14, 1971 (Item A), specified in pertinent part that bids "* * * will be received until 3:00 P.M., Local Prevailing Time, June 15, 1971 at the office of the Superintendent[,], Yosemite Village[,], Yosemite National Park, California and at that time publically opened." The protest from the attorneys for Frank Hudson, Inc., dated June 24, 1971 (Item C), alleged that a representative of the protesting firm was in the Superintendent's office well before 3 p.m., on June 15, 1971, with its sealed bid in his possession, but was informed that bids were to be opened in a nearby warehouse. The Hudson representative allegedly arrived at the warehouse just after 3 p.m. Hudson's bid, although the lowest, was disqualified as a late bid. Hudson asserted that its bid was tendered in the Superintendent's office prior to 3 p.m. and that any award without consideration of its bid would be invalid as not in conformance with statutory and regulatory requirements governing formal advertising.

¹ Appeal file, Item A. References will be to the appeal file unless otherwise noted.

A memorandum, dated July 8, 1971 (Item D), forwarding the protest to the Director, National Park Service for decision states that the facts with regard to the late bid had previously been discussed by telephone with the Director's office and a decision made that the bid should be disregarded. The memorandum further states that this informal advice had been received prior to receipt of the formal protest,² that award had been made to COAC on June 28 and that issuance of the notice to proceed would be withheld pending a decision on the protest.

By letter dated July 15, 1971 (Item E), which indicates that it was hand carried, COAC furnished executed copies of the contract, performance and payment bonds to the contracting officer. These documents were apparently furnished to COAC by letter from the contracting officer, dated June 28, 1971. COAC requested that the notice to proceed issue as soon as possible in order that performance not be extended into the winter months.³ On August 12, 1971, the Director of the Office of Survey and Review issued a decision (Item G), denying the protest upon the ground that Hudson's representative chose not to deliver the bid at the place specified in the invitation. As previously noted, the

notice to proceed was issued on August 16 and receipt thereof was acknowledged by COAC on August 18, 1971.

A letter from Park, Swaner & Leslie, COAC's attorneys, dated September 22, 1972 (Item U), asserted a claim in the total amount of \$65,662.79 of which \$34,197.12 was attributable to delay in issuance of the notice to proceed. The letter asserted that COAC had been led to believe that the notice to proceed would be issued in a timely manner, that issuance of the notice to proceed 64 days after bid openings on a project of 180 calendar days performance time where weather factors were critical constituted a change or changed conditions⁴ entitling the contractor to relief. It was alleged that the delay in commencement of the work not only increased the contractor's costs, but also affected the quality of the work in that concrete pours were directed under conditions which were detrimental to full and adequate performance.

COAC's claim was rejected by the contracting officer in a letter dated November 22, 1972 (Item V), for the reason that there was no unreasonable delay in issuing the notice to proceed. The contracting officer denied that COAC was led to believe that notice to proceed would be issued on an accelerated basis, asserted that COAC was telephonically

² The record does not indicate whether the Park Service had informal notice of the protest prior to award.

³ The contracting officer's letter to COAC of November 22, 1972 (Item V) refers to letters of July 7 and July 15, 1971 expressing COAC's desire to be directed to proceed as soon as possible. The letter of July 7, 1971 is not in the record.

⁴ This contention is amplified in its complaint wherein COAC alleges that delay in issuance of the notice to proceed compelled it to perform in the winter and thus under changed conditions from those contemplated when the contract was entered (Paragraph 3 of Complaint, dated June 12, 1974).

notified of the protest on June 28 after the notice of award had been mailed, that historically 45 days was required for processing and reaching a determination on such a protest and alleged that COAC was informally notified that the protest had been denied on August 12, 1971, the 45th day after award. In a letter, dated May 12, 1973 (Item X), COAC's attorneys reiterated their position that COAC was entitled to additional compensation because of the undue delay in issuance of the notice to proceed. A finding and decision by the contracting officer was requested. The contracting officer issued a decision on August 20, 1973, (Item Y) denying the claim for the reasons previously stated and for the additional reason that there was no provision in the contract authorizing payment for the alleged delay in issuance of the notice to proceed. This timely appeal followed.

COAC computed its claim on the basis of an efficiency loss due to inclement weather of 40 percent of direct labor expended during the winter months (\$57,750.64) or \$23,100.25. To this figure was added \$5,398 for alleged additional requirements due to two months of delay. While this sum presumably represents standby costs for labor or equipment, the specific nature of the costs represented by this figure is not specified. A sum of \$1,238.38 for additional equipment (scaffolding, heating units and protective visqueen) and \$4,460.49 for overhead and profit at 15 percent was

added to reach the claim total of \$34,197.12.

Decision

[1] The contracting officer's conclusion that no provision of the contract authorizes payment for delay in issuance of the notice to proceed ignores Clause 23 of the General Provisions, Suspension of Work, and is erroneous. It is well settled that an unreasonable delay in issuance of the notice to proceed may constitute a suspension of the work entitling the contractor to compensation for increased costs thereby incurred in accordance with the standard Suspension of Work Clause.⁵ The weight of authority is to the effect that the "Changed or Differing Site Conditions" clause is applicable only to physical conditions in existence at time of award.⁶ We will consider the complaint as amended to request recovery under the Suspension of Work Clause.

The Government argues (Brief, p. 2; Findings & Decision, p. 2) that since COAC allowed 60 days after the date of bid opening for the acceptance of its bid and since COAC acknowledged receipt of the notice to proceed on August 18, 1971,

⁵ *ABC Demolition Corporation*, GSBGA No. 2289 (August 16, 1968), 68-2 BCA par. 7166; *L. O. Brayton & Company*, IBGA-641-5-67 (October 16, 1970), 77 I.D. 187, 70-2 BCA par. 8510.

⁶ See *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472 (1972) and *John McShain, Inc. v. United States*, 179 Ct. Cl. 632-631 at 638 (1969). Cf. *Dunbar & Sullivan, Eng.* BCA Nos. 3165 *et al.* (September 7, 1973), 73-2 BCA par. 10,285.

the 64th day after bid opening, there was no unreasonable delay in issuance of the notice to proceed. The problem with this position is that once the award is made,⁷ the amount of time the Government might have taken in effecting an award is irrelevant to the Government's obligation to issue the notice to proceed.⁸

The Government also argues that the contracting officer acted reasonably in withholding issuance of the notice to proceed pending a decision on the protest and that the time occupied in processing and rendering a decision on the protest was reasonable. While the record does not establish that the contracting officer had informal notice of the protest prior to the award, we think it unlikely that the formal protest came as a surprise to the contracting officer and that it is at least more

probable than not that the prompt award was occasioned by considerations relating to the obligation of funds. Be that as it may, it has been held that the requirements for recovery under the Suspension of Work Clause are: (i) an actual or constructive, total or partial, suspension of the work for the convenience of the Government, (ii) that the suspension delayed the work for an unreasonable length of time and (iii) that the unreasonable delay caused additional expense.⁹

A constructive, total suspension of the work has clearly been shown and we turn to the question of whether the delay was for an unreasonable period of time. While the underlying reason for the delay in issuing the notice to proceed was the protest, it does not follow that resolving the reasonableness of the delay is dependent upon determining the accuracy of the Government's assertion that time spent in processing and deciding the protest was reasonable. It would seem, rather, that the focus must be on when the notice to proceed should reasonably have been issued, notwithstanding the protest.¹⁰ Since we

⁷ We recognize that it has been held that the purported award of a construction contract in the absence of performance and payment bonds required by the Miller Act did not result in a contract containing the General Provisions, including the standard Disputes clause, and that therefore the Board was without jurisdiction of appeals from assessments of excess costs incurred after the purported contracts had been terminated for default for failure to furnish the bonds. *Doral Construction Co., Inc.*, ASBCA No. 13734 and *Manson, Smith, McMahsters, Inc.*, ASBCA No. 14128 (December 17, 1973), 74-1 BCA par. 10,432. Cf. *Kansas City Natural State Company, Inc.*, VACAB No. 1053 (June 15, 1973), 73-2 BCA par. 10,094. Performance and payment bonds were furnished by COAC and we express no opinion on this issue.

⁸ *ABC Demolition Corporation* (note 5, *supra*). Although the contract in *ABC Demolition* contained a clause which was interpreted as requiring that the notice to proceed issue upon approval of the bonds, in our opinion such a clause merely shortens the time in which delay in issuance of the notice to proceed, after approval of the bonds, will be considered unreasonable.

⁹ *Meritt-Chapman & Scott Corp. v. United States*, 194 Ct. Cl. 461 (1971), interpreting an earlier version of Suspension of Work clause.

¹⁰ In *ABC Demolition Corporation* (note 5, *supra*), delay in issuance of the notice to proceed was due to the fact that buildings scheduled for demolition under appellant's contract were still occupied which in turn was because leased space into which the occupants were to move was not available. The Board did not undertake to determine the collateral issues of whether the Government had reasonable alternatives to delaying issuance of the notice to proceed such as finding

conclude that COAC has failed to establish that it was damaged by the delay, we find it unnecessary to decide this question. Nevertheless, a few observations are in order. Whatever may have been the legal status of the contract immediately after the award was made (note 7, *supra*), it is clear that notice to proceed could not reasonably have been expected by COAC until the executed performance and payment bonds were returned. The bonds were delivered to the Government on Thursday, July 15, 1971, and the time for issuance of the notice to proceed must be measured from that date. No question has been raised as to the adequacy of the bonds, and absent evidence to the contrary, it would seem that four or five working days should have been adequate for any required processing and re-

temporary quarters for the occupants or whether the delay in making the leased space available was reasonable, but instead ruled: " * * * The Government, however, cannot impose such a delay on Appellant and avoid liability on the ground that the delay was necessary or desirable to serve the Government's purpose or convenience. The mere fact that it may not have been the fault of GSA that the two buildings were still occupied because the prospective lessor had not made the new quarters available at the expected time is not a basis upon which the Government can avoid its liability to the Appellant * * *." 68-2 BCA at 33,253. Cf. *J. W. Bateson Company, Inc.*, GSBCE No. 3441 (June 18, 1973), 73-2 BCA par. 10,098 (since some delay on a construction job is expected and since the Government was continually exerting its best efforts to secure abandonment of certain utility lines which was necessary in order for the work to proceed, the first 30 days of delay was determined to be reasonable).

views.¹¹ The Government was on notice that COAC desired that notice to proceed issue as soon as possible in order that the work not extend into the winter months. Under these circumstances, an appealing case has been made that any delay beyond July 23, 1971, in issuance of the notice to proceed was unreasonable. As COAC has not proved damage from the delay, we do not decide this issue.

A prerequisite to recovery of additional costs for working in the winter in a case like the present one is a showing that the initial delay caused or at least contributed to the work being carried over to the winter months.¹² Since the record does not show the date COAC commenced prosecution of the work and does not show the scheduled times for various operations and the dates these operations were started and completed, it is evident that no such showing has been made in the instant case. We may not assume that COAC prosecuted the work with such diligence that there were no intervening delays for which it was responsible. It is also apparent that costs have been asserted in a most summary fashion upon the basis of a 60-day delay when the actual de-

¹¹ In *ABC Demolition Corporation* (note 5, *supra*) the Board concluded that performance and payment bonds should have been approved not later than eight calendar days after receipt from the contractor.

¹² *Altman-Wolfe Associates*, ASBCA No. 8315 (November 19, 1963), 1963 BCA par. 3960, affirmed on reconsideration (January 20, 1964), 1964 BCA par. 4014.

lay is less than one-half of that time span. Under these circumstances, the amounts claimed are little more than unsupported assertions or conclusions which may not be accepted as proof.¹³ The claim for increased costs due to the delay in issuance of the notice to proceed is denied.

Directed Method of Repair

The record shows that the concrete floor slab for the Camp 7 Pumping Station was poured on October 8, 1971,¹⁴ and that walls and roofs of Camp 7 and 12 stations were poured on November 16, 1971 (Findings of Fact—Unacceptable Concrete, Item J). Prior to placement of concrete, reinforcement was checked for proper installation and forms were checked for alignment and cleanliness. Each batch of concrete was visually checked and routine tests were performed to maintain maximum slump at four inches. Constant vibration was maintained while each batch of concrete was placed. Each structure was covered with plastic sheeting and a small electric heater was placed inside. At Camp 7, an inside form slipped resulting in a bulge about four feet

long and four to five inches in height in one corner. When the exterior forms were removed at Camp 7 and 12 stations extensive spalling resulted.¹⁵ This spalling is shown on photos one through seven which were taken in January 1972, and submitted to the Board by Department counsel's memorandum, dated October 31, 1974. A supplement to Findings of Fact—Unsatisfactory Concrete (Item J) signed by Harold J. Chittum, project inspector stated the spalling could have resulted from the way the forms were removed and/or freezing weather conditions. Numerous small air pockets on the exterior walls of the Camp 7 and 12 structures were also reported.

The lower floor slab for the Yosemite Creek Pumping Station was poured on October 15, 1971, concrete for the lower walls and intermediate floor was placed on November 4, 1971, the intermediate walls, wet well wall,¹⁶ and the main floor of this station were placed on

¹⁵ Exterior surfaces above grade were to consist of a series of 7¼-inch raised concrete ribs or bars on three inch spacing, the entire surface to have a rough-sawn lumber finish (Detail 6, Sheet 2, Construction Drawings). Although Section 105.20 of the specifications entitled "Trimming and Repairs" states that it was intended that forms, concrete mixture and workmanship be such that exposed surfaces required no patching, this section contains rather detailed procedures for the filling of recesses left by removal of forms with a specified mortar mix and for the repair of surface defects which did not impair structural strength.

¹⁶ Although the Findings of Fact—Unacceptable Concrete Work (Item J), signed by John C. Ballard, project supervisor, states that wet well fill was placed on January 4, 1972, we find, relying on a supplement to the findings signed by project inspector Henry R. Espinoza, that this fill was placed on Decem-

¹³ " * * * such evidence, including statements in claim letters, cannot alone establish matters in issue or dispute, and there is no acceptance of 'advocacy without evidence' through unsubstantiated allegations of fact made by claimant or counsel in pleadings and briefs. * * * " *American Machine & Foundry Company*, ASBCA No. 10173 (August 21, 1967), 67-2 BCA par. 6540 at 30,383 (footnote 1). See also *Young Associates, Inc.*, IBCA-557-4-86 (December 4, 1968), 69-1 BCA par. 7419.

¹⁴ A new concrete floor was not required at Camp 12 Pumping Station (Sheets 5 & 6 of Construction Drawings).

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December 10, 1971 (Item J). The lower pump room wall superstructure walls and roof of Yosemite Creek station were placed on January 4, 1972. Heating by means of tenting and use of space heaters was required on all concrete placements made after December 1, 1971.¹⁷ Heating was continued during curing and after forms were removed for a minimum of five days. Forms, steel reinforcement and aggregates and fines used in the mix were also heated. Concrete was generally good and only two batches were rejected, one as too wet and one as too rocky.

Form and steel work was inspected prior to placement of concrete and was considered adequate. Pumping of the concrete was performed in a manner considered satisfactory. Continuous vibration of concrete was maintained during the pours. The structure was covered with plastic sheeting and space heaters utilized inside. However, when the forms were stripped on January 8 and 9, 1972, there were many rock pockets and honeycombed areas and areas where the forms bulged or were displaced resulting in an uneven surface.

In a letter dated January 14, 1972 (Item I), COAC was advised by the project supervisor that the col-

ored concrete superstructure of the Yosemite Creek Pumping Station above the main floor level, including interior and exterior walls and roof, was unacceptable. The concrete fill in the wet well at this station was unacceptable to the extent of the template section, surface texture and finish.¹⁸ In addition, COAC was informed that exterior finish of the Camp 7 and 12 stations was unacceptable. COAC was directed to remove the unsatisfactory superstructure of the Yosemite Creek station and replace it with a structure in strict accordance with the specifications,¹⁹ to remove the unsatisfactory surface of the wet well and reconstruct it to the template and finish specified and to repair the exterior surfaces of the Camp 7 and 12 stations by methods approved by the contracting officer.

At a meeting on January 14, 1972, wherein the unsatisfactory work was discussed, Mr. Sheldon Coudray, COAC's President, promised to make every effort to repair Camp 7 and 12 Pumping Stations to the satisfaction of the National Park Service. Mr. Coudray was of the opinion that satisfactory repairs could be made to the structure at

ber 10, 1971. Concrete having the most defects, appears to have been placed on January 4, 1972.

¹⁷ Although Section 105.19 of the specifications requires that after being placed all concrete shall be protected so that temperature at the surface will not fall below 50° F, Mr. Espinoza's statement (note 16, *supra*) indicates that the lowest temperature on the structure (Yosemite Creek) the night of December 10, 1971 was 34° F.

¹⁸ On page 2 of Findings of Fact—Unacceptable Concrete Work, defects in wet well are described as follows: "The fill in the wet well is not to the specified template and the surface texture is rough with many extensive rock pockets and honeycomb evident."

¹⁹ Section 105.20 of the specifications provides in pertinent part: "If substantial repairs are required, the defective portions shall be cut out to sound concrete and the masonry replaced by means of a cement gun, or the masonry shall be taken down and rebuilt all as the Engineer may decide or direct."

Yosemite Creek and stated that if it was required that the structure be demolished, it would cause serious financial problems for COAC and would likely bankrupt his concrete subcontractor. He asserted that if the decision to demolish the superstructure was final, he would have to "pull off" or abandon the project. He complained that the delay of 63 days in award of the contract [issuance of notice to proceed] caused the contractor to work in adverse weather.

COAC responded to the project supervisor's letter of January 14 by letter, dated January 21, 1972 (Item F), which stated that COAC did not expect the Park Service to accept any structure which did not meet the requirements of the specifications. The letter further stated that COAC was engaging an independent consulting firm to make an examination and determination of deficiencies that may exist and that COAC would propose a course of action based on the findings and suggestions of the consultants.

The report of Consulting Quality Control Engineers was forwarded to the Contracting Officer by a letter from COAC dated January 25, 1972 (Item L). The letter referred to special efforts by COAC's cement finishers then underway in repairing, grinding and sacking the lower walls of the Yosemite Creek Pumping Station as evidence that satisfactory repairs could be accomplished. COAC requested permission to repair the structures in accordance with the recommendations of the consultants.

Consulting Quality Control Engineer's report, dated January 21, 1972, states that at Yosemite Creek Pumping Station rock pockets exist in the exterior interface of the superstructures and the below grade structure at the water seal, that rock pockets are present in various locations on the internal walls and ceiling,²⁰ and that the template area in the bottom section of the underground structure was not properly shaped. The consultants were of the opinion that the structural integrity of the superstructure was excellent and that the rock pockets were attributable to placing concrete with an extremely low slump (one to two inches rather than the recommended four inches) and to excessive internal vibration of concrete. Application of excessive vibration was attributed to low slump concrete. A recommended procedure for repair of the defects utilizing a grout mix of three parts sand to one of cement²¹ was set forth. Defects reported by the consultants at Camp 7 and 12 stations were rocky exterior surfaces due to improper removal of forming boards. The report concludes that these surfaces could be restored to architectural

²⁰ Defects at Yosemite Creek are illustrated by photos 8 through 95 which were taken in January 1972 and submitted to the Board by Department counsel's memorandum of October 31, 1974.

²¹ Mortar specified in the specifications for repairs consisted of a 1 : 1½ cement and sand mix. In addition, the consultants recommended that voids to be filled with grout be coated with a two percent calcium chloride water solution while the specifications provided, *inter alia*, that cavities be thoroughly wetted and promptly painted with one-sixteenth-inch brush coat of neat paint to the consistency of lead paint.

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satisfaction by application of a three to one grout mix and by tapping a board, which has been sand-blasted, against the repaired surface in order to give the concrete a wood texture.

By letter, dated February 8, 1972 (Item M), COAC was informed that its proposal for repair was unacceptable and that it was the contracting officer's final decision that the superstructure of the Yosemite Creek Pumping Station be demolished to the main floor level and reconstructed in strict accordance with the plans and specifications. COAC was directed to remove unsatisfactory material and surface in the wet well and reconstruct it to the template and finish specified. At Camp 7 and 12 stations, COAC was given the option of demolishing the existing structures to the main floor level and replacing the structures or placing a minimum four-inch, reinforced colored concrete wall on the existing structures.

At a meeting on February 29, 1972, the Park Service abandoned its insistence that the superstructure of the Yosemite Creek Pumping Station be demolished (memo to the files, dated March 1, 1972, Item N). Mr. Coudray, President of COAC, proposed repairing the structure at Yosemite Creek by chipping out unsatisfactory concrete, packing voids and rock pockets with concrete and pouring a beam around the exterior at the level of the water stop. He proposed "buttering" on a coat of colored grout at Camp 7 and 12 stations to improve the appearance.

Park Service representatives stated that at Yosemite Creek they would agree to chipping out unsound concrete, pouring concrete into the voids, forming and pouring a "girdling beam" four inches thick to a height of about four inches above the top of the largest rock pocket and the application of a waterproofing material to the exterior. It was suggested that COAC attempt bush hammering of fins at Camp 7 and 12 stations and that if an acceptable surface could not be attained by that method, a full stucco treatment (2 or 3 coats— $\frac{3}{4}$ " \pm) might be required. COAC agreed to submit a proposal detailing specific corrective methods and outlining procedures for the contracting officer's approval.

COAC submitted its proposal for the repair work by letter, dated March 6, 1972 (Item O), which stated in part "This corrective work will be performed by the Contractor at no additional cost to the Government." At Camp 7 and 12 stations, COAC proposed to retexture raised exterior surfaces of the concrete by bush hammering until an appearance acceptable to the contracting officer was attained.²² If this could not be accomplished, COAC proposed to apply a three-coat archi-

²² The contracting officer found (p. 3 of findings) that the corrective work was accomplished followed by sandblasting. Although sandblasting removed the rough-sawn lumber finish required by the drawings, the resulting finish was considered acceptable and the structures were accepted. Repair procedures proposed in COAC's letter of March 6, 1972, did not include sandblasting and the record does not indicate that sandblasting was directed by the Park Service.

tectural stucco finish similar to the vertical combed pattern as illustrated in the Portland Cement Association pamphlet entitled "Plaster's Manual." Repair of construction joint and water stop at base of superstructure walls (Yosemite Creek station) was to be accomplished by chipping out [unsound concrete], pouring and placing a reinforced concrete beam as illustrated in an attached sketch²³ and applying two coats of bituminous waterproofing material to an elevation four feet above the main floor. Other unsatisfactory areas, were to be corrected by chipping out unsound concrete and repairing by conventional dry packing methods. Substantial areas that extended into the reinforcing steel were to be repaired by an acceptable guniting system of applied mortar, or if the unsound concrete extended through the wall in any area, it was to be repaired by forming both sides and placing new concrete under pressure. COAC proposed to furnish and install a 20-year bonded tar and gravel roof with an acceptable copper gravel stop. The letter acknowledged that methods of repair were subject to the contracting officer's approval and that if satisfactory repairs could not be accomplished, the work could be rejected.

COAC's proposed methods of repair were approved by the contract-

ing officer (letter, dated March 14, 1972, Item P). Repairs, except for those to the roof at Yosemite Creek station,²⁴ were accomplished at a date not determinable from the record, but sometime prior to June 20, 1972 (COAC letter of even date, Item Q).

The letter previously referred to from COAC's attorneys (Item U) asserts that the Government directed that certain nominal deficiencies be corrected in a manner more expensive than necessary. The letter alleged that COAC advised the Government that it considered the direction to proceed in a more expensive manner to be a change, but that COAC was informed that unless it agreed to perform as directed, without a change order, dire consequences would follow. It was asserted that COAC thereupon performed as directed.

COAC's claim was comprised of \$1,088 for consultant's fees, \$15,765.94 for cement finishers, \$11,131.72 for laborers, \$1,597.87 for equipment rental and material, which totals \$29,583.53. From this figure COAC subtracted \$2,222.08, representing a sum allegedly included in its bid and added \$4,104.22 for overhead and profit at 15 percent to reach the total amount claimed of \$31,465.67.

²³ Proposed work described on the sketch is as follows: "1. Chip out unsound concrete. 2. Install proposed rebar.* 3. Install concrete beam. 4. Apply asphaltic water proofing." (sic) *The proposed rebar was to consist of No. 4 bars at 2" horizontal spacing and No. 4 bars at 18" vertical spacing tied to the existing rebar.

²⁴ Defects in the roof were not as extensive as feared and COAC was permitted to correct defects therein by concrete patching and an epoxy coating in lieu of a 20-year bonded roof (COAC letter, dated June 23, 1972, Item R; Findings of Fact by project supervisor, dated June 28, 1972, Item S; and letter from project supervisor, dated August 2, 1972, Item T).

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COAC's claim was rejected by the contracting officer by letter, dated November 22, 1972 (Item V), for the reason that the deficiencies were grossly unacceptable, that Mr. Coudray recognized that the work was defective and agreed in writing that the corrective work would be performed at no additional cost to the Government. COAC's assertion that it was threatened with dire consequences was denied, the contracting officer asserting that all that was required was that the structures comply with the specifications prior to acceptance.

The final decision of the contracting officer, dated August 20, 1973 (Item Z), denied the claim for the reasons set forth above and for the additional reason that the claim was barred for failure to give the written notice required by Clause 3, Changes, of the General Provisions. The contracting officer specifically found that repair procedures were proposed by COAC's letter of March 6, 1972. He further found that at the meeting of February 29, 1972, COAC did not state that it regarded the repair work to be a contract change.

Additional Findings of Fact and Decision

Although bush hammering and sandblasting performed at Camp 7 and 12 stations were not methods of repair provided in the specifications, the complaint limits the claim for additional work to the Yosemite Creek Pumping Station. COAC does not dispute the exist-

ence of deficiencies, but asserts that less expensive methods of repair which it proposed would have resulted in a structure in compliance with contract requirements and that COAC was, under duress, compelled to agree to perform additional unnecessary work beyond the requirements of the contract at no additional cost to the Government (Complaint, p. 2). The alleged duress consists of improper threats of default termination, assessment of liquidated damages and withholding of payment.

The less expensive methods of repair referred to are presumably those suggested by the consultants employed by COAC or those proposed by Mr. Coudray at the meeting of February 29, 1972. Repair procedures proposed by the consultants differed, albeit in particulars seemingly insubstantial, from those in the specifications (note 21, *supra*) and there would appear to be no doubt that the contracting officer could properly decline acceptance of such proposal for that reason alone.²⁵ However, the refusal was not based on the fact that repair procedures proposed by COAC differed from those in the specifications or from those considered acceptable by the contracting officer, but on the view that no repairs were permissible and that the defects were such that the superstructure

²⁵ The Government is, of course, entitled to strict compliance with specifications. *Farwell Company, Inc. v. United States*, 137 Ct. Cl. 832 (1957); *Holland Construction Company, DOTCAB No. 72-12* (June 28, 1973), 73-2 BCA par. 10,142 and cases cited.

of the Yosemite Creek Pumping Station must be demolished to the main floor level and reconstructed. The specifications gave the contracting officer a wide discretion as to the proper corrective action "where substantial repairs are required."²⁶ In this connection, the contracting officer determined that defects at Yosemite Creek were major and that the contract did not contemplate repairs of the extent actually allowed. Although COAC asserts that the demand that the structure be demolished was arbitrary and unnecessary, we cannot, on this record, say that the contracting officer's finding is erroneous.

[2] We have found that the proposal to pour a concrete beam at the waterstop at Yosemite Creek originated with COAC (Mr. Coudray), while some details such as thickness and height of the beam, that the beam be reinforced and that waterproofing be applied to the exterior were specified by Park Service representatives. Differences, if any, between specification methods of repair and the manner by which the balance of the repairs at this station were accomplished, save for epoxy coating on the roof, are not apparent from the record. An

essential part of COAC's case is that methods of repair actually employed were more costly than methods of repair in the specifications or more costly than methods which should reasonably have been required by the contracting officer.²⁷ The record will not support a finding to this effect.

[3] Even if our findings above had been otherwise, COAC's allegation that it was under duress, compelled to agree to perform the corrective work at no additional cost to the Government is not supported by the record. While there can be no doubt that threats to terminate for default when there is no legal right to do so may constitute duress sufficient to avoid a contract supplement,²⁸ there is no evidence that termination for default was even so much as mentioned to COAC.²⁹ Also absent from the record is any evidence of threats to assess liquidated damages and any evidence of actual or threatened improper withholdings of moneys due COAC. It follows that COAC has failed to sustain its claim of duress.

²⁷ Proof of damage is, of course, a prerequisite to relief. *Steenberg Construction Company*, IBCA-520-10-65 (May 8, 1972), 79 I.D. 153 at 376, 72-1 BCA par. 9459 at 44,044.

²⁸ *Urban Plumbing & Heating Co. v. United States*, 187 Ct. Cl. 15 (1969). Cf. *Bish Contracting Company, Inc.*, IBCA-951-1-72 (February 12, 1973), 73-1 BCA par. 9896.

²⁹ It would be logical to suppose that Park Service representatives raised the possibility of termination for default at the meeting of January 14, 1972, in response to Mr. Coudray's statement to the effect that if the decision to demolish the structure at Yosemite Creek was final, he would have to pull off of the project.

²⁶ Note 19, *supra*. Insistence on demolition of a structure which could be repaired to comply with specification requirements may, if complied with, constitute a compensable change. *Arnold M. Diamond, Inc.*, ASBCA No. 15063 (November 9, 1973), 73-2 BCA par. 10,359. Cf. *Travis Construction Company*, ASBCA No. 17918 (August 26, 1974), 74-2 BCA par. 10,846.

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Conclusion

The appeal is denied.

SPENCER T. NISSEN,

Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,

Chief Administrative Judge.

PEGGS RUN COAL COMPANY, INC.

3 IBMA 421

Decided December 6, 1974

Appeal by Peggs Run Coal Company, Inc., and by the Mining Enforcement and Safety Administration from a decision by an Administrative Law Judge, assessing penalties in the sum of \$1,260 for 16 violations of the Federal Coal Mine Health and Safety Act of 1969 under Docket No. PITT 73-6-P.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Sufficiency

A notice of violation charging that an operator of a loading machine was not making tests for methane at a working face and was not equipped to make such tests does not allege a violation of the safety standard in 30 CFR 75.307-1, which requires that an examination for methane be made at the face of each working place during each shift and immediately prior to the entry of electrical equipment into any working place.

2. Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Computer Printout

A computer printout indicating the operator's failure to submit samples of respiratory dust will support a violation of 30 CFR 70.250, requiring individual sampling, where the operator fails to offer substantial evidence to rebut the reliability of the printout.

3. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result.

APPEARANCES: Richard M. Sharp, Esq., and John R. Carfley, Esq., for appellant Peggs Run Coal Company, Inc., Mark M. Pierce, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

I.

Procedural Background

The 17 alleged violations involved in this proceeding arise from inspections of Peggs Run Coal Company, Inc. (Peggs Run), No. 2 Mine, conducted by Bureau of Mines, now Mining Enforcement and Safety Administration (MESA) inspectors in March 1971, November 1971, and January and February 1972. On July 10, 1972, MESA filed a Petition for Assessment of Civil Penalties charging

violations of the Federal Coal Mine Health and Safety Act (Act) and regulations issued pursuant thereto.¹ A hearing was held in Pittsburgh, Pennsylvania, on October 10,

11, and 12, 1973. In his initial decision, dated March 29, 1974, the Administrative Law Judge (Judge) assessed penalties for 16 violations as follows:

<i>Notice number</i>	<i>Date</i>	<i>30 CFR section</i>	<i>Amount</i>
1 JB-----	Nov. 16, 1971	77. 509	\$200
2 JB-----	Nov. 16, 1971	75. 301	150
4 JB-----	Nov. 16, 1971	75. 301	150
1 RJK-----	Nov. 30, 1971	70. 250	100
2 RCM-----	Jan. 10, 1972	75. 507	40
1 RCM-----	Jan. 10, 1972	75. 516	40
1 RCM-----	Jan. 3, 1972	75. 1100-2(e)	25
1 RCM-----	Jan. 31, 1972	75. 512	20
2 RCM-----	Jan. 31, 1972	75. 301	100
3 RCM-----	Jan. 31, 1972	75. 316	100
1 RCM-----	Feb. 1, 1972	75. 515	40
2 RCM-----	Feb. 1, 1972	75. 516	40
3 RCM-----	Feb. 1, 1972	75. 1718	15
1 RCM-----	Feb. 2, 1972	75. 400	100
2 RCM-----	Feb. 3, 1972	75. 302	100
1 RCM-----	Feb. 3, 1972	75. 400	40
Total-----			\$1,260

The Judge vacated Notice No. 3 JB, November 16, 1971, charging a violation of 30 CFR 75.307-1, on the ground that MESA had failed to prove a violation of this section.

In assessing penalties, the Judge duly considered each of the requisite factors under section 109(a) (1) (30 U.S.C. § 819(a) (1)) of the Act. At the time he rendered his decision, two appeals² involving the same operator and the same mine were pending before this Board. As to history of previous violations, therefore, the Judge properly considered only those violations he found to exist in the present case.

On April 5, 1974, Peggs Run filed its Notice of Appeal from the

Judge's decision. On April 23, MESA filed a cross-appeal directed only at that portion of the Judge's decision vacating Notice No. 3 JB, November 16, 1971. On May 18, 1974, Peggs Run filed its appeal brief with the Board, and the brief of MESA, in answer to the appeal was filed on July 12, 1974.

II.

Issues Presented

A. Whether the Judge properly vacated Notice No. 3 JB, November 16, 1971, alleging a violation of 30 CFR 75.307-1.

B. Whether the Judge properly concluded that a violation of 30 CFR 70.250 was proved by MESA.

C. Whether, as to remaining violations listed above, the Judge

¹ 30 U.S.C. §§ 801-960 (1970).

² Docket Nos. PITT 71-68-P and PITT 72-28-P.

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erred either in finding the fact of violation or in applying the criteria of section 109(a) (30 U.S.C. § 819) of the Act in assessing penalties.

III.

Discussion

A.

Notice No. 3 JB, November 16, 1971, cited a violation of 30 CFR 75.307-1 in the following terms:

The operator of the 14 BU-10 loading machine in 3 west main section was not making tests for methane at the working faces and was not equipped to make such tests.

The regulation alleged to be violated, 75.307-1 reads as follows:

An examination for methane shall be made at the face of each working place during each shift and immediately prior to the entry of such electrical equipment into any working place. Until December 31, 1970, a permissible flame safety lamp may be used to make tests for methane required by the regulations in this part. On and after December 31, 1970, a methane detector approved by the Secretary shall be used for such tests and a permissible flame safety lamp may be used as a supplementary testing device.

MESA bases its argument in part on the statutory provision immediately preceding this regulation recited as 30 CFR 75.307 (30 U.S.C. § 863(h)(1)) which reads as follows:

At the start of each shift, tests for methane shall be made at each working place immediately before electrically operated equipment is energized. Such tests shall be made by qualified persons. If 1.0 volume per centum or more of methane is detected, electrical equipment shall not be energized, taken into, or

operated in, such working place until the air therein contains less than 1.0 volume per centum of methane. Examinations for methane shall be made during the operation of such equipment at intervals of not more than 20 minutes during each shift, unless more frequent examinations are required by an authorized representative of the Secretary. In conducting such tests, such person shall use means approved by the Secretary for detecting methane.

At the hearing the inspector who issued the Notice (No. 3 JB) testified that he arrived at the mine section involved when the mining cycle was in progress and that he observed the loading machine in operation for a period in excess of 20 minutes during which time he saw no tests for methane being made (Tr. 89). He could not say, however, whether a test for methane had been made prior to the entry of electrical equipment into the section (Tr. 94), or whether a test for methane was made at the face of the working place during the shift (Tr. 95, 96). In view of this evidence, counsel for the operator moved for vacation of this notice of violation.

Rather than move to amend its petition to cite a violation of the statutory provision, recited in section 75.307, *supra*, counsel for MESA chose instead to rely on the text of the notice as issued and the inspector's testimony as proving a violation of the regulation set out in section 75.307-1.

The Judge observed in his decision that "the 20 minute examination provision is clearly a requirement of Section 75.307 only," and

concluded that the evidence presented did not prove a violation of section 75.307-1. Consequently he vacated Notice No. 3 JB, November 16, 1971.

MESA contends that the aforementioned statutory provision and regulation must be "read in *pari materia*" and that both were violated. It argues that since the operator of the loading machine was not provided with an approved methane detector or permissible flame safety lamp for a period exceeding 20 minutes, he could not have complied with section 75.307-1.

Peggs Run contends that the Notice was properly vacated because MESA did not show that the methane examinations required by section 75.307-1 had not been made.

[1] The Board is of the view that Notice No. 3 JB, November 16, 1971, was properly vacated. As written, the Notice does not spell out a violation of section 75.307-1, which neither requires the loading machine operator to make tests for methane nor to be equipped to make such tests. We do not agree with MESA that the doctrine of *pari materia* is properly applicable in this instance. This doctrine might be applied in a general sense to any number of statutory provisions, and regulations issued pursuant thereto; however, where, as here, MESA is seeking assessment of a monetary penalty, and has the burden of proving that the violation alleged in its Notice did in fact occur, we believe it must be more precise in describing the exact violation it expects to prove at the hearing. This

in no way implies that this Board condones any slackening of vigilance either on the part of MESA or the operator in examinations for the presence of methane, and we do not believe our decision here will have such effect. On the contrary, we believe that precise charges of the violations MESA expects to prove provide a keener tool for enforcement of safety standards and also serve to expedite penalty proceedings. Therefore, the Judge's decision to vacate Notice 3 JB, November 16, 1971, is hereby affirmed.

B.

Notice No. 1 RJK, November 30, 1971, charged Peggs Run with a violation of 30 CFR 70.250 as follows:

The ADP Center in Denver, Colorado, has indicated that respirable dust samples have not been submitted as required for the employees listed on the attached printouts.

The regulation cited, section 70.250, provides in its entirety as follows:

(a) Except as provided in paragraphs (b) and (c) of this section, one sample of respirable dust shall be taken from the mine atmosphere to which each individual miner is exposed at least once every 180 days, except those miners already sampled during such 180-day period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230.

(b) One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner assigned to a working section is exposed at least once every 120 days, except those miners already sampled during such 120-day period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230.

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(c) One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner who has exercised his option to transfer in accordance with the provisions of § 203(b) (1) of the Act is exposed at least once every 90 days.

(d) The samples required under the provisions of this section shall be taken during any shift where the miner is employed in his usual occupation or in the occupation to which he was transferred.

The computer printout, dated September 30, 1971, lists the "last sample date" and the "required date" for submission of samples for 15 miners identified by name and social security number. According to a MESA witness, the printout had been sent to Peggs Run by registered mail (Tr. 128) on or about September 30, 1971 (Tr. 125-6). The operator's Superintendent and Safety Director testified, however, that he had searched company records but "could not find * * * a computer printout or anything to notify the company that this problem did exist" prior to the November 30, 1971, Notice of Violation (Tr. 441). This witness could give no information about the operator's respiratory dust sampling procedures (Tr. 446) nor could he state with certainty that samples for the miners listed on the printout had been collected and submitted (Tr. 442, 454), as required.

In the evidence adduced at the hearing it was conceded by a witness for MESA that sample processing is subject to human error

(Tr. 139), and that potential inaccuracies may arise because the mine operator has not properly filled out the "mine data card" submitted with the sample (Tr. 133), or because of erroneous key typing of data by MESA personnel (Tr. 139).

The Judge concluded after weighing all the evidence that the alleged violation occurred and that it was nonserious. In his decision he noted that as to most of the miners listed on the printout a long period of time had elapsed between the required date for submission of samples and the date of the Notice of Violation. He found, therefore, that "the operator was negligent in that he knew or should have known of the situation."

On appeal to this Board, Peggs Run emphasizes the fallibility of the printout procedures and questions whether they are adequate as proof of the violation charged.

MESA contends that the Board's decisions in *Castle Valley Mining Co.*, 3 IBMA 10, 81 I.D. 34, 1973-1974 OSHD par. 17,233 (1974) and *Itmann Coal Company*, 3 IBMA 29, 81 I.D. 71, 1973-1974 OSHD par. 17,265 (1974) are dispositive of Peggs Run's appeal as to this Notice of Violation.

[2] The Board is of the view that the violation as charged was proved by MESA by a preponderance of the evidence and that a penalty was properly assessed therefor. The respiratory dust regulations, to be effective, depend on the cooperation

* The oldest "required dates" appearing on the printout are for December 1970.

of the operator and MESA.⁴ In the instant case, MESA charged Peggs Run with a violation of 30 CFR 70.250, *i.e.*, failure to take samples of respirable dust. The charge was based on a computed printout, generated in the regular course of business, as a work product of MESA's usual and customary routine⁵ pursuant to the Act and regulations. Peggs Run did not produce any credible evidence concerning its dust sampling and transmittal procedure which would outweigh the evidence presented by MESA. It belabored the conceded (possible) imperfections of the system in general but was utterly unable to show any likelihood that the names listed on the printout were listed mistakenly, or conversely, that the required samples had in fact been taken for these individuals. Since the operator failed to effectively rebut the data on the printout, we hereby affirm the Judge's ruling as to Notice No. 1 RJK, November 30, 1971, and the amount of the penalty assessed therefor.

C.

[3] As to the remaining 15 violations, some of which are admitted, we have carefully reviewed the entire record and find Peggs Run's arguments to be wholly without merit. No substantive argument is presented to place into question the findings and conclusions of the Judge. We conclude, therefore, that the Judge's findings of violation are

correct and that he properly weighed the criteria of section 109 (a) (30 U.S.C. 819(a)) of the Act in assessing penalties therefor.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of March 29, 1974, in the above-captioned case IS AFFIRMED and that Peggs Run Coal Company, Inc., pay penalties in the amount of \$1,260 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

ADMINISTRATIVE APPEAL OF

PAUL G. SIEGFRIED

AREA DIRECTOR, BILLINGS,

ET AL.

3 IBIA 195

Decided December 9, 1974

Appeal from an administrative decision of the Area Director, Billings, January 30, 1974, canceling Siegfried business lease No. 0257-13-64 Northern Cheyenne Reservation Montana.

Reversed and remanded.

⁴ See generally, *Castle Valley Mining Co., supra*.

⁵ See Tr. 109-142.

V. AREA DIRECTOR, BILLINGS, ET AL.

December 9, 1974

**1. Indian Lands: Leases and Permits:
Long-term Business: Official Representations**

No issue of estoppel can be raised where Federal officers make correct representations relied upon by third persons, and later the officials reverse themselves taking an incorrect position upon which no reliance is placed.

**2. Indian Lands: Leases and Permits:
Long-term Business: Option for Extension**

When a bilateral lease contract includes an option for extension, it is not necessary to find a separate identifiable consideration for the option.

**3. Indian Lands: Leases and Permits:
Long-term Business: Cancellation**

Failure to use a leasehold for the purpose specified in the lease, does not constitute a breach of the lease terms sufficient to justify cancellation of the lease in absence of a showing on the record of detriment to the landowners or the leasehold.

APPEARANCES: Richard J. Carstensen, Attorney, Billings, Montana, for appellant; Bertram E. Hirsch, Attorney, Association on American Indian Affairs, Inc., New York, New York, for Martha Whitecrane, Joseph Walks-along, Moses Yellowrobe and Carol Whitewolf, appellees.

NO APPEARANCES: Jeanette Lines-bigler and Nancy Limberhand, lessors; Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCKEE

**INTERIOR BOARD OF
INDIAN APPEALS**

Lease No. 0257-13-64 dated October 21, 1963, between "William Yellowrobe Estate" Allottee No. 1440, of the Northern Cheyenne Tribe, lessor, and Paul G. Siegfried, lessee, covering a portion of allotment No. 1440, containing 8.5 acres was executed November 26, 1963. The Acting Superintendent of the Northern Cheyenne Indian Reservation, R. E. McLean, signed the lease in his official capacity in behalf of the heirs of the beneficial interest in the allotment, citing as his authority "Ath. IAM 54 5.3 (CFR 131.2(a)(4))," and he also approved it as the Acting Superintendent on the same date. The effective date of the lease term was February 1, 1964, for a period of ten years "W/option to renew another ten years." The lease rental was by its terms subject to review for adjustment of fair market rental at the end of the first five-year period to the then prevailing fair market rental. The initial rental was \$100 per year, and a bond in the amount of \$100 was required.

The stated purpose of the lease was "for location of saw mill, mill pond, log and lumber storage space, waste disposal unit, and other buildings needed to house operational equipment, subject to provisions stipulated in this lease form." The rental was based upon an August 26, 1963, appraisal by the Bureau of Indian Affairs and was revised to \$125 per year by a second appraisal dated November 30, 1970, effective the year 1971. The bond for the new

rental and all rentals accrued in the interim have been paid.

The regulation cited as authority for execution of the lease is 25 CFR 131.2(a)(4). By the regulation the Secretary may grant leases on individually owned land on behalf of:

* * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees;
* * *

In this case none of the Indian owners of the beneficial interest in the allotment was using any portion of the allotment.

Prior to the execution of the lease on July 11, 1963, the Superintendent had issued a notice to each individual owner of a beneficial interest:

This is to advise you that allotment No. 1440, William Yellowrobe of which you hold an (stated interest) undivided interest, is available for a business lease on February 1, 1964, not to exceed a ten year period. You, therefore, have 90 days in which to negotiate and lease this property to a reliable lessee acceptable to this office.

* * * * *

If, after this 90 day period the heirs have not presented to this office an acceptable lease, this office will execute a lease in accordance with and pursuant to the act of July 8, 1940 (54 Stat. 745, 25 U.S.C. 380). This act authorizes the superintendent to execute a lease at the highest rental attainable without the consent of the land owners.
(Italics supplied.)

The record shows that allotment No. 1440 encompassed a total of 55 acres of land, more or less.

The appellant lessee herein had been in possession of that portion of the allotment used as the sawmill site under leases dating back to 1959, or possibly earlier. In addition, he had admittedly erected a residence on the property which he occupied for some years. Upon its destruction by fire he rebuilt, and is currently occupying the same under the current lease of 8.5 acres. The record does not disclose that the heirs to whom the notice was sent ever obtained a lessee for this or any other portion of the allotment.

On January 30, 1974, the Area Director notified the appellant that the lease was canceled and the provision contained in the lease giving an option for an additional 10-year period was invalid for the reason that the Acting Superintendent had no authority to sign or approve such a lease under his delegations of authority; and that in executing the lease he had violated the authorization issued by the Superintendent which limited the lease, " * * * not to exceed a 10 year period." The Area Director further indicated that the action of the Acting Superintendent was contrary to statute and regulation without citing any supporting reason or authority for his ruling.

We cannot agree with the decision of the Area Director.

[1] The appellant alleges in his brief that at dates and times prior

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December 9, 1974

to the January 30, 1974, notice of cancellation, the Superintendent, the Area Director and the Field Solicitor had upon occasion by letter and other communication led the appellant to believe that the option for the second ten-year term was valid; and that the option would be honored in the event the appellant chose to retain possession. The appellant goes to considerable length in his brief arguing that the Superintendent, the Area Director and the Government are estopped by these representations from reversing the prior declaration. This argument is answered at length by the appellees in their brief.

It is our conclusion that estoppel is not involved as an issue in this case. The record includes a memorandum to the Area Director from the Commissioner of Indian Affairs dated January 7, 1974, where it is stated:

It is noted that the decision to cancel the lease effective January 31, 1974, was predicated upon the premise that the Acting Superintendent did not have the authority on November 26, 1963, to approve a business lease for a term of 10 years with the option to renew for another 10 years. Our records do not support this position. Billings Area Redelelegation Order No. 1 of January 12, 1955 (20 FR 277) authorized the Superintendents to approve business leases pursuant to 25 CFR 171 (now CFR 131).

An examination of the citation given to the Federal Register in the Commissioner's memorandum supports this ruling, and no conflicting authority appearing, the Commis-

sioner's statement shall be taken as correct. It is further noted that it gives the Acting Superintendent the full authority of the Superintendent, and this we also find to be correct on this record on the following basis. In *Nofire v. United States*, 164 U.S. 657 (1897) it became critical to determine whether or not a deceased murder victim had been adopted by the Cherokee Indians to make him a Cherokee citizen. The marriage of the victim to a Cherokee woman was considered a part of the controlling evidence. The endorsement of that marriage upon the official records of the Cherokee Nation by an employee in the office of the clerk rather than by the clerk or his deputy was discussed by the Court as follows:

T. W. Triplett was the clerk of the Tahlequah district at the date of this certificate. R. M. Dennenberg was his deputy, but at the time of the issue of the license both the clerk and his deputy were absent, and the signature of the deputy was signed by John C. Dennenberg, his son. The clerk, the deputy, and his son each testified that the latter was authorized to sign the name of the clerk or the deputy in the absence of either, and that the business of the office was largely transacted by this young man, although not a regularly appointed deputy. He made quarterly reports, fixed up records, and issued scrip, and his action in these respects was recognized by the clerk and the Nation as valid. * * * The circuit court said that the evidence was insufficient to show that fact, and that, therefore, that court had jurisdiction.

With this conclusion we are unable to concur. The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites

thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact. * * * (Citations of authority omitted.)

Nofire v. United States, supra, is cited in 63 Am. Jur. 2d 496 in support of the statement by the author:

An act in the name of an officer by another person who is not a deputy, but who was in sole charge of the office, transacting the business, with the permission of the officer and the deputy, is that of an officer de facto.

Nofire, supra, is also cited with approval by the court in *United States v. 15.3 Acres of Land, Etc.*, 154 F. Supp. 770, 787 (D.C. Pa. 1957) in the footnote.

On the basis of the foregoing authority it is our conclusion that an Acting Superintendent may perform the functions and exercise authority of a Superintendent, absent specific limitations placed upon him and made known to third parties relying upon his actions.

In this connection note is taken of the fact that the Superintendent's memorandum notice to the heirs dated July 11, 1963, gave them notice to produce a lease to the entire allotment whereas at a much later date on November 26, 1963, the Acting Superintendent signed for the heirs and approved for the Secretary that lease dated October 21, 1963, which covers only a portion of the allotment. We are not willing to presume that the Superintendent's July 11 notice was an "order" or that it had continuing effect on November 26, which would limit the

authority of the Acting Superintendent and render invalid the lease option for an additional 10-year term.

[2] The appellees in their brief raise a point of lack of consideration for the option. This issue can be disposed of upon the observation that the lease agreement includes a number of covenants bilateral and material in character. It is our conclusion that the matter is governed by the rule set forth in *The Restatement of the Law of Contracts* (1932), which is,

§ 83. ONE CONSIDERATION FOR A NUMBER OF PROMISES.

Consideration is sufficient for as many promises as are bargained for and given in exchange for it if it would be sufficient:

(a) for each one of them if that alone were bargained for, or

(b) for at least one of them, and its insufficiency as consideration for any of the others is due solely to the fact that it is itself a promise for which the return promise would not be a sufficient consideration.

In reviewing the record before us we find no difficulty in arriving at the finding that the appellant herein elected to exercise the option to extend the lease for a second ten-year period. On January 21, 1974, prior to the cancellation notice, the appellant's attorney addressed a letter to the Area Director in which he indicated the agreement of the appellant to a reappraisal of the rental value, and he indicated further that in view of the fact that lessors wished to terminate the lease the appellants were willing to negotiate a new lease for a period shorter than

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the 10 years mentioned in the option at a new and increased rate. This offer is a continuing offer since it is repeated in the appellant's reply brief. Nothing herein should be taken as a bar to further negotiations on the appellant's offer. In no event, however, should the lease be continued at the same rental rate as is currently provided without a supplemental appraisal of the fair rental value.

In addition to the other matters mentioned heretofore, appellee alleged breaches of the lease materially sufficient to justify a cancellation by the Superintendent. The record does not support the allegation of nonpayment of rent or failure to file the rent bond, but if any delinquencies do exist they should be cured immediately.

[3] The appellees allege that the appellant has breached the lease by failing to conduct the sawmill business specified as the purpose of the lease, but they failed to indicate in what manner this may constitute a detriment to them as owners or to the leasehold. This matter, if it constitutes a breach, is not sufficiently established in the record at this point to justify cancellation of the lease.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 211 DM 13.7 (December 14, 1973), it is hereby ORDERED: the decision of the Area Director issued January 30, 1974, canceling business lease no. 0257-13-64 is hereby

REVERSED and this matter is hereby REMANDED to the Area Director for further proceedings in accordance with the findings herein.

This decision is final for the department.

DAVID J. MCKEE,

Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,

Administrative Judge.

FREEMAN COAL MINING COMPANY

3 IBMA 434

Decided December 9, 1974

Appeal by the Mining Enforcement and Safety Administration from a decision by an Administrative Law Judge in Docket Nos. VINC 72-65 and 73-223-P vacating a notice of violation and order of withdrawal issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, converting each to a 104 (b) notice, and assessing penalties thereon.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Recklessness

Where the evidence does *not* show that the operator consciously disregarded or grossly deviated from a mandatory standard of care in the Act or substantive regulations, an Administrative Law Judge is warranted in finding that there was *no* recklessness and in concluding that there was *no* unwarrantable failure.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge has no authority to convert a section 104(c) citation into a section 104(b) notice of violation.

3. Federal Coal Mine Health and Safety Act of 1969: Penalties: Negligence

Where an Administrative Law Judge has failed to make an express finding regarding negligence but his decision shows that he properly considered the existing evidence establishing negligence in calculating his penalty assessment, the Interior Board of Mine Operations Appeals will remedy the technical defect by making the necessary finding and will then affirm the assessment.

APPEARANCES: Robert W. Long, Esq., Associate Solicitor, Richard V. Backley, Esq., Assistant Solicitor, John H. O'Donnell, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Harry M. Coven, Esq., and Richard R. Elledge, Esq., for appellee, Freeman Coal Mining Company.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

I.

Factual and Procedural Background

This case presents for the Board's consideration a decision by an Administrative Law Judge in Docket

Nos. VINC 72-65 and 73-223-P which were consolidated below for purposes of hearing and decision because they both involved two alleged violations of section 304(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act)¹ cited, respectively, in a notice of violation and subsequent order of withdrawal issued pursuant to section 104(c)(1) of the Act.² Docket No. VINC 72-65 is an Application for Review which was filed by Freeman Coal Mining Company (Freeman) pursuant to section 105(a) of the Act³ and Docket No. VINC 73-223-P is a proceeding for assessment of civil penalty⁴ which Freeman instituted by filing a petition for hearing and formal adjudication.

By decision dated July 11, 1973, the Administrative Law Judge vacated both the notice of violation and order of withdrawal, converted each to a 104(b) notice, and assessed penalties thereon. MESA appeals to the Board contending: (1) that the Judge vacated the notice and order upon the erroneous conclusion that there was insufficient evidence of unwarrantable failure; (2) that assuming no unwarrantable failure *arguendo*, the Judge had no authority to convert the subject 104(c) citations to 104(b) notices; and (3) that the penalties assessed should be increased since the Judge made no finding of negligence.

¹ 83 Stat. 774, 30 U.S.C. § 864(a) (1970), 30 CFR 75.400. This section proscribes "accumulations" of combustible materials.

² 83 Stat. 751, 30 U.S.C. § 814(c)(1) (1970).

³ 83 Stat. 753, 30 U.S.C. § 815(a) (1970).

⁴ 83 Stat. 756, 30 U.S.C. § 819 (1970).

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MESA asks that we exercise our discretionary *de novo* review powers to find unwarrantable failure on the existing evidence of record and to make an appropriate adjustment in the amounts of civil penalty. 43 CFR 4.605.

II.

Issues Presented on Appeal

A. Whether the Administrative Law Judge erred in concluding that the condition cited in the subject 104(c)(1) notice was not the result of an unwarrantable failure to comply with section 304(a) of the Act.

B. Whether an Administrative Law Judge has authority to convert a 104(c) citation into a section 104(b) notice of violation.

C. Whether the penalties assessed should be adjusted upward since the Judge made no express finding with respect to negligence.

III.

Discussion

[1] The Judge concluded that the instant notice of violation, 1 MW, dated April 12, 1972, was an invalid section 104(c)(1) notice on the ground that the violation cited therein was not caused by an unwarrantable failure to comply with section 304(a) of the Act (Dec. 5). He further held that the instant order of withdrawal, 1 MC, dated June 1, 1972, did not meet the requirements of section 104(c)(1) because it was predicated on an in-

validly issued section 104(c) notice and the violation cited therein was not caused by an unwarrantable failure to comply (Dec. 8).

In pertinent part, the section 104(c)(1) notice reads as follows:

* * * Accumulations of loose coal and coal dust were present on the shuttle car roadways, ranging from four inches to seven inches in depth and along the ribs, varying from six inches to 18 inches in height and one to two feet in width, also piles were observed at several intersections. The accumulations were present from station no. 1850 inby for a distance of about 100 feet in "C" and "D" entries and from station no. 1850 inby for a distance of about 222 feet in "A" and "B" entries, in the 1 West off main south south.

Inspector Michael Wolfe, who issued the subject notice, testified that in his opinion the "accumulations" observed and cited in the notice were the results of the mining process rather than spalling, sloughing or rib rash (Tr. 130-133).

MESA submits that the above-quoted alleged violation was caused by an unwarrantable failure to comply on three grounds. First, it contends that Freeman had been informed and had ignored warnings by MESA officials that a cleanup in cycle was required in preference to the company practice of cleaning up on the idle shift, that is to say, every third shift (Tr. 169, 170, 174). Next, it argues that the mine superintendent had been notified, by the issuance of a 104(b) notice, two days before receipt of the instant (c)(1) notice, that the mine

was not in compliance with the "accumulation" proscription and clean-up requirement of section 304(a) of the Act. Finally, it points out that the condition cited was readily observable.

The controlling precedent, against which MESA's arguments must be tested, is the Board's recent decision in *Eastern Associated Coal Corp.*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974).⁵ There, the Board held that "unwarrantable failure" is a measurement of fault the meaning of which is to be determined on a case-by-case basis. We said:

* * * that a given 104(c) violation possesses the requisite degree of fault where, on the basis of the evidentiary record, a reasonable man would conclude that the operator *intentionally* or *knowingly* failed to comply or demonstrated a *reckless disregard* for the health or safety of the miners. * * * (Footnote omitted.) [3 IBMA at 356, 81 I. D. at 578].

Applying the above-quoted passage to MESA's first contention regarding the regularity of cleanup, we are of the opinion that the Judge acted well within his fact finding responsibility in discounting the fact that Freeman cleaned up every third shift rather than in cycle. *Eastern Associated Coal Corp.*, *supra*, 3 IBMA at 345; cf. 43 CFR 4.605. The admitted existence of a regular and apparently frequent cleanup program at the subject mine tends to show a sustained effort to comply with section 304(a),

as well as a definite regard for the health and safety of miners exposed to the hazards of fire, explosion, and dust inhalation. It is conceivable that a more frequent clean up was warranted in light of the speed at which proscribed "accumulations" occurred at the subject mine, but there is nothing in the record to suggest that such was the case. Neither does the record support the conclusion that the failure to clean up more often on a systematic basis was the result of an exceptionally high degree of sustained fault of which the subject "accumulation" was just one example. At most, all that can be concluded is that Freeman was guilty of simple negligence in failing to clean up an extraordinary "accumulation" more quickly than called for by its existing clean-up program. In addition, since section 304(a) does not by its literal terms require a cleanup *program with specified frequency*, and in view of the fact that the Secretary has not promulgated a substantive regulation to that precise effect, we are not inclined, given the paucity of the evidentiary record at hand, to overturn the Judge's determination that the instant violation was not the result of an unwarrantable failure to comply.

With respect to MESA's second contention regarding the significance to be accorded an antecedent 104(b) notice of violation in determining whether there was an unwarrantable failure, we think that, here too, the Judge was fully warranted in giving little weight, if

⁵ The Board has reaffirmed this decision upon reconsideration. 3 IBMA 353, 81 I.D. 627, 1974-1975 OSHD (1974).

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any, to the disputed piece of evidence. We have reached this conclusion because this antecedent notice was not probative of a proposition of fact relevant to the issue of "unwarrantable failure."⁶ MESA introduced this 104(b) citation "* * * as evidence of notice to Freeman that compliance with section 304(a) of the Act is required * * *" (Br. p. 8). The issue of "unwarrantable failure" in an "accumulation" case presents the question of whether the operator intentionally or knowingly or recklessly permitted the accumulation of or failed to clean up the particular masses of combustible materials charged in a 104(c) citation. It does not concern the question of whether the operator was at fault for not being aware generally that the Act proscribes and requires cleanup of "accumulations."⁷ Consequently, the Judge was correct in disregarding the disputed 104(b) notice.

Finally, with respect to MESA's last contention concerning the ready observability of the "accumulation" now before us, we find that it too fails to provide a persuasive or com-

PELLING basis upon which to overturn the Judge's conclusion of no unwarrantable failure. The fact that the condition cited was readily detectable can support an inference of simple negligence, that is to say, an unreasonable failure to be aware of a deviation from the standard of care imposed by section 304(a) which poses a probable but not imminent threat of serious bodily harm or death. However, the fact of ready observability *by itself* is not sufficient to support a conclusion of recklessness, that is to say, a conscious disregard constituting a *gross* deviation from the legislated standard of care. If that fact cannot by itself support an inference of recklessness, it follows *a fortiori* that it provides an appreciably weaker basis from which to find that Freeman knowingly or intentionally failed to clean up.

In order to underscore the narrow point we are making with regard to the sufficiency of the evidence of fault in this case, we deem it appropriate to look back to the record in *Eastern Associated Coal Corp., supra*, where we upheld a conclusion of unwarrantable failure. 3 IBMA at 356-7. There, the violation in question was an alleged deviation from the roof control plan, namely, the lack of a sufficient number of posts to limit roadway width. Apart from the fact that the lack of sufficient posts was visible, there was *direct* evidence that the condition had persisted for at least three working shifts during which retreat mining had been in progress.

⁶ The Judge refused to give probative weight to the disputed 104(b) notice because MESA refused to prove it up. MESA has argued on appeal that it was not necessary to prove the charge stated in the 104(b) notice. We need not consider this question since we hold that the notice was introduced for an irrelevant purpose.

⁷ Parenthetically, we might observe that an operator is conclusively presumed to know the provisions of the Act and the regulations promulgated pursuant thereto. Any other viewpoint would lead to the recognition of extraordinary defenses based upon ignorance of the law which would subvert the deterrent purposes of the Act in a manner contrary to Congressional intent.

Moreover, as the Judge in that case recognized, a roof control plan is created by the operator for the continuous guidance of its employees in the course of operations designed to extract coal. Those facts in addition to the palpable nature of the violation provided the solid evidentiary basis from which to conclude that the deviation from the standard of care was gross and the product of conscious disregard rather than the product of inadvertence. Based upon there being no similarly solid record on the question of unwarrantable failure in the case at hand, we must uphold the Judge's conclusion that there was no unwarrantable failure.

Having duly considered and rejected MESA's appellate challenge to the Judge's decision and order vacating the instant 104(c)(1) notice and order, we turn now to the remaining issues, namely, the power of a Judge to convert a 104(c) citation to a 104(b) notice and the failure of the Judge to make proper findings with respect to negligence in assessing a civil penalty.

[2] With respect to the former, we note that subsequent to the issuance of the decision below in this case, the Board ruled in *Freeman Coal Mining Corp.*, that an Administrative Law Judge has no power to charge an operator with a violation by converting a section 104(a) order of withdrawal to a section 104(b) notice of violation. We held that the initial determination as to which statutory sanction should be employed in a given situation is a

matter of enforcement discretion which does not fall within an Administrative Law Judge's review or adjudicative function.⁸

The reasoning and conclusions of the Board in the *Freeman* case cited above are fully applicable to the case at hand and we conclude that it was error to convert the instant 104(c) citation to a 104(b) notice and that the decision should be modified to set aside the order of conversion. We observe, however, that this error was harmless in the circumstances of this case. Having invalidated the instant section 104(c) notice and order in the review portion of this case under section 105 of the Act, the Judge correctly assessed a civil penalty in the separate section 109 proceeding which was also before him.⁹ In doing so, he simply followed the pattern previously set in imminent danger cases where the condition or practice cited in the withdrawal order was a violation of a mandatory standard. In such cases, the subsequent invalidation in a review proceeding of the withdrawal order has always been without prejudice to a proceeding to assess a civil penalty for the violation cited in such order. This settled practice is the product of a widespread recogni-

⁸ 2 IBMA 197, 209-10, 80 I.D. 610, 1973-1974 OSHD par. 16,567 (1973); *aff'd sub nom.*, *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F. 2d 741, 1974-1975 OSHD par. 18,862, No. 73-1909 (7th Cir. October 22, 1974).

⁹ If a section 104(c) notice or order is struck down for the reason that the condition cited therein is not a violation of a mandatory health or safety standard, then of course there is no basis for assessing a civil penalty.

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tion that section 109 of the Act mandates the assessment of a civil penalty for a violation found to have occurred irrespective of whether it is cited in a 104(b) notice or in some other citation under the Act. Thus there has never been any need to issue an order of conversion prior to assessing a penalty for violations involved in the issuance of an invalid withdrawal order under section 104(a) of the Act where the invalidity was based on a lack of imminent danger. Likewise, we now hold that a conversion to a 104(b) notice is both unnecessary and unauthorized as a preliminary to assessing a penalty for a violation cited in a notice or order issued under section 104(c) which is held invalid because of lack of proof of unwarrantability.

[3] With respect to MESA's final argument, we note that the Judge made no specific findings with regard to the mandatory criterion of negligence in assessing \$250 for the (c) (1) notice and \$375 for the (c) (1) withdrawal order. Based upon the basic findings and discussion of the evidence in the opinion below, as well as the reasonableness of the assessments ordered, we see no need to disturb the amounts of penalty. We merely complete the record by finding that each of the violations in Docket No. VINC 73-223-P was the result of simple negligence attributable to Freeman.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by

the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in Docket No. VINC 72-65 IS AFFIRMED AS MODIFIED and IT IS FURTHER ORDERED that the decision in Docket No. VINC 73-223-P IS AFFIRMED and the penalties assessed therein SHALL BE PAID on or before thirty days from the date of this decision.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

ZEIGLER COAL COMPANY

3 IBMA 448

Decided December 10, 1974

Appeal by Zeigler Coal Company from a decision by an Administrative Law Judge in Docket No. VINC 72-75 upholding the validity of an unwarrantable failure withdrawal order.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation

The existence and validity of an underlying section 104(c) (1) notice of violation is reviewable in a section 105(a) proceeding under the Act as an incident to the determination of the validity of a section 104(c) (1) withdrawal order.

2. Federal Coal Mine Health and Safety Act of 1969: Applications for Review: Pleading

By virtue of 43 CFR 4.532(a)(1), the validity or nonexistence of an underlying section 104(c)(1) notice should be specifically pleaded to place the matter properly in issue.

3. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally

A challenge to the specificity of a pleading is waived on appeal when not made before the trier of fact.

4. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

An admission by an operator's witness, who is in a position to know, of the issuance of a notice of violation to the operator is sufficient evidence to prove that such a notice did in fact exist.

5. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Gravity Requirements

Where the evidence of record shows that a violation cited in a section 104(c)(1) withdrawal order did *not* reasonably pose a probable risk of serious bodily harm or death, an Administrative Law Judge should conclude that the violation could *not* have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, and should vacate the order.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Richard V. Backley, Esq., Associate Solicitor, John P. McGeehan, Esq., Trial Attorney, for appellee, the Mining Enforcement and Safety Administration; Guy Farmer, Esq., for intervenor, Bituminous Coal Operators' Association.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal presents for the Board's consideration a decision by an Administrative Law Judge in Docket No. VINC 72-75 upholding a withdrawal order that had been issued by a federal coal mine inspector, Mr. Harry Greiner, pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 83 Stat. 751, 30 U.S.C. § 814(c)(1) (1970). The withdrawal order in dispute, 1 HG, was issued on May 11, 1972, to the Zeigler Coal Company (Zeigler) at the Zeigler No. 4 Mine which is located in the State of Illinois. The alleged condition cited in that order reads as follows:

Inasmuch as Field Office Supervisors had conferred with top company officials and local mine management that a program for cleaning up loose coal and coal dust be put into effect, and after ample time was given to implement such a program, and after a 104(b) notice and 104(c)(1) notice was issued the condition was still observed. Accumulations of loose coal and coal dust were present along the ribs varying [*sic*] from 4 to 15 inches in depth and 12 to 18 inches in width. Also piles of loose coal and coal dust were observed in cut out niches in the ribs at several locations in the nos. 6, 7 and 8 northeast entries from 90 feet inby station no. 510 for a distance of 300 feet inby toward the working places.

Zeigler instituted the present proceeding by filing in the Hearings Division a timely Application for Review pursuant to section 105(a)

of the Act. 83 Stat. 753, 30 U.S.C. § 815(a) (1970). Subsequently, Answers in Opposition coupled with Motions to Dismiss were filed by the Mining Enforcement and Safety Administration (MESA) and a representative of the miners, the United Mine Workers of America (UMWA). A hearing on the merits was held on June 20, 1973 before an Administrative Law Judge.

The Judge's decision dismissing Zeigler's Application and upholding the withdrawal order was handed down on November 13, 1973. Following issuance of the decision below, Zeigler filed a timely Notice of Appeal with the Board. Thereafter, on December 14, 1973, we granted the Motion for Leave to Intervene submitted by the Bituminous Coal Operators' Association (BCOA). Timely briefs by all parties were subsequently filed.

On appeal, Zeigler argues that the Judge erroneously found that an underlying section 104(c) (1) notice existed and had been issued. Joined by BCOA, Zeigler also submits that the Judge erroneously concluded as a matter of law that the record need not and did not show that the violation in question could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard.¹ Both Zeigler and BCOA have requested

oral argument with regard to the latter contention; however, inasmuch as the Board heard argument and dealt at length with this same question only recently in *Eastern Associated Coal Corp.*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), we perceive no need for another oral presentation. For the reasons set forth hereafter, we hold the instant withdrawal order invalid, and accordingly, we reverse the decision below.

Discussion

With regard to Zeigler's first contention, we note that the Judge found that an underlying 104(c) (1) Notice of Violation, 1 HG, had been issued on April 28, 1972. Zeigler insists that there is no probative evidence in the record tending to show the issuance of that notice and asks that we set aside the Judge's finding and enter a contrary finding. 43 CFR 4.605.

Before addressing ourselves directly to Zeigler's contention, we must first deal with two objections submitted by MESA against any consideration of this point on appeal. First, MESA argues that we are jurisdictionally barred from reviewing any aspect of the underlying notice because it was not timely challenged by the instant Application for Review. Second, MESA urges us not to consider Zeigler's attack on the notice because its non-existence was never pleaded.

[1] Turning first to the suggested jurisdictional bar to our con-

¹ In addition, Zeigler has contended that the condition cited by the Judge was not violative of 30 CFR 75.400 because of wetness and was not the product of an unwarrantable failure to comply. It is unnecessary in the determination of this appeal to deal with these additional arguments and we intimate no view as to their merits.

sideration of Zeigler's contention that an antecedent 104(c)(1) Notice of Violation had not been issued, our starting point for analysis is the language of section 105(a) of the Act. 83 Stat. 753, 30 U.S.C. § 815(a)(1) (1970).² In pertinent part, that section reads as follows:

An operator issued an order pursuant to the provisions of section 104 of this title * * * may apply to the Secretary for review of the order *within thirty days of receipt thereof* * * *. An operator issued a notice pursuant to section 104(b) or (i) of this title, * * *, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. * * * (Italics added.)

As the second sentence of the above-quoted passage reveals, Congress specifically provided for the exceptional and limited circumstances under which a notice of violation, may *by itself* be the subject of a review proceeding as distinguished from a section 109 penalty proceeding. 83 Stat. 756, 30 U.S.C. § 819 (1970). The legislators listed 104(b) and (i) notices and allowed review of them solely with regard to the question of the reasonableness of the time allowed for abatement. According to the normal canons of statutory construction, the express mention of some members of a series of related items impliedly excludes

all others in the series not so named.³ It therefore follows that, by expressly providing only for a limited review of a section 104(b) or (i) notice under section 105(a) of the Act, the Congress impliedly and deliberately excluded direct review of 104(c)(1) notices. Accordingly, we are of the view that the validity of a section 104(c)(1) notice *by itself* is not subject to challenge at the initiative of the operator by Application for Review.

This is not to say, however, that an operator is wholly foreclosed from contesting the validity of a (c)(1) notice on his own initiative.⁴ As the first sentence of section 105(a)(1) indicates, an operator may file an Application for Review of a section 104 closure order provided that he does so within thirty days of receipt thereof. Inasmuch as a section 104(c)(1) withdrawal order must be supported by a valid, underlying (c)(1) notice, the elements of the validity of such a notice or the fact of its existence may be challenged as an incident of the review of the withdrawal order.

³ *Expressio unius est exclusio alterius*. See, e.g., *Kings Station Coal Corp.*, 2 IBMA 291, 80 I.D. 711, 1973-1974 OSHD par. 16,879 (1973).

⁴ There is nothing in the Act to preclude the Secretary from promulgating regulations pursuant to section 109 of the Act so that the issues which bear on the validity of a 104(c)(1) notice may be litigated promptly at the operator's initiative as an incident of a penalty assessment determination. The tests of validity apart from the fact of violation are litigable as issues relevant to the assessment of an appropriate civil monetary penalty. 83 Stat. 756, 30 U.S.C. § 819(a); *North American Coal Corp.*, 3 IBMA 98, 118-119, 81 I.D. 204, 1973-1974 OSHD par. 17,658 (1974).

² We may consider MESA's argument, despite the agency's failure to cross-appeal, because jurisdictional questions may be raised at any point in our proceedings, even *sua sponte* if necessary.

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See *Eastern Associated Coal Corp., supra*. In the context of such a challenge, the lack of a valid underlying notice may be an allegation of the invalidity of the (c)(1) withdrawal order in dispute.

In the case at hand, Zeigler filed an Application for Review, which concededly omitted any mention of the underlying notice, within the thirty day limitation imposed by the Act. Having timely filed its Application, Zeigler had, in our view, fully invoked the review jurisdiction of the Secretary regarding any allegation of invalidity concerning the withdrawal order named in the Application, including the lack of a valid underlying notice of violation. Its failure to allege any particular ground of invalidity within the timely filed Application posed only a question of proper notice pleading pursuant to 43 CFR 4.532 (a), but did not raise any jurisdictional issue because section 105 does not purport to deal with the specificity of pleadings or any time limitation on amendments to pleadings, and apparently leaves such procedural matters to the sound discretion of the Secretary and his delegates. Thus, we conclude that the failure to plead the lack of an underlying (c)(1) notice is not a jurisdictional bar to our consideration of whether the record supports the Judge's finding that such a notice did indeed exist.

[2] We come then to MESA's other preliminary objection, namely, the failure to amend the Application for Review to charge the lack

of an antecedent (c)(1) notice. In this connection, we note that section 4.532(a)(1) of 43 CFR, which prescribes the content of an Application for Review, provides in relevant part as follows:

(a) An application for review and an answer shall comply with applicable general requirements and shall contain:

(1) a short and plain statement of (i) such party's position with respect to each issue of law or fact which the party contends is pertinent to the legality or correctness of the order * * *. (Italics added.)

Although this regulation is not a license for academic quibbling over words, it does plainly require a degree of specificity in pleading sufficient to apprise the trier of fact and other parties of the grounds of invalidity in issue.⁵

[3] As we noted earlier, Zeigler's Application for Review contains no allegation concerning the alleged underlying notice. When this issue emerged at the hearing, MESA might have brought this pleading defect to the fore by objecting to the admission of evidence on the ground of immateriality, that is to say, any evidence on that issue was not probative of any allegation in Zeigler's Application.⁶ In addition, MESA could have invoked the authority of 43 CFR 4.532(a)(1) by moving to dismiss without prejudice

⁵ We have indicated on several occasions in the past that more specific pleading than has been the usual practice is both desirable and required as a means of narrowing the precise issues to be tried. *Kings Station Coal Corp., supra*, 2 IBMA at 301, n. 7; *North American Coal Corp., supra*, 3 IBMA at 121.

⁶ MESA only objected on the jurisdictional ground which we have already held to be without merit.

in order to force Zeigler to seek leave to amend.⁷ MESA did not take either of these actions, and consequently, we are of the opinion that the failure to raise the question of proper notice pleading below precludes MESA from raising it for the first time at the appellate level.⁸ We, therefore, conclude that MESA's second objection, like the first, must be denied.

[4] Having disposed of these preliminary objections, we may now turn our attention to Zeigler's attack on the Judge's finding that an antecedent section 104(c) (1) notice existed. In this regard, we observe that the alleged notice was never submitted for admission into the record and that the sole evidence of its existence is the following colloquy between counsel for MESA and Zeigler's witness, Mr. Stanton Roberts, during cross-examination which appears at page 46 of the transcript.⁹

Q. Do you recall a notice of violation that was issued under 104(c), I believe Mr. Woods referred to before, issued on April 28th, 1972, involving excessive ac-

cumulation of coal dust, do you have any recollection of that sir?

A. If it is the one I am thinking of, it was at the same belt drive.

Q. Let me show you a copy of the notice and see if it will refresh your recollection, sir.

A. This is the one that was issued to Dave Gully. I wasn't there that day.

Q. Was it your responsibility as safety director of Zeigler Number 4 Mine to review these notices?

A. Yes, sir.

Q. Do you recall reviewing this notice?

A. Yes, sir.

In our opinion, the above-quoted passage constitutes an admission of the existence and issuance of the underlying 104(c) (1) notice. While it would have been preferable for MESA to have offered the notice itself into the record as the best evidence, we are of the view that the admission of the witness quoted above, who was in a position to know, constitutes sufficient probative evidence to support the Judge's finding that such a notice had in fact been issued. Accordingly, we find no merit in this phase at Zeigler's appeal.

[5] The other argument with which we are obliged to deal is presented jointly by Zeigler and BCOA. As noted earlier herein, they contend that the record must, but did not in fact, show that the violation cited in the instant order of withdrawal could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, that is to say, the violation must be of a high degree of gravity.

⁷ It is true that MESA coupled a motion to dismiss with its Answer denying the allegations contained in the Application for Review and averring " * * * that the facts in said Order constitute an imminent danger subject to action under Section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 * * * [sic]." Under our regulations, a motion to dismiss puts in issue only those grounds which are specifically listed. 43 CFR 4.510. The failure of Zeigler to challenge the underlying notice does not come within the ambit of any of the allegations of the Answer which are the stated grounds for dismissal.

⁸ *Kings Station Coal Corp.*, *supra*, 2 IBMA at 297, n. 4.

⁹ MESA also claims that testimony found at pages 27 and 29 of the transcript constitutes an admission of the existence of the notice. We have examined those pages and find that they do not support MESA's argument.

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Recently, we had occasion to consider the criteria of validity for any section 104(c) citation. In *Eastern Associated Coal Corp.*, *supra*, we upheld the validity of a section 104(c) (2) withdrawal order, and in the course of our opinion, we said that the basic tests of validity for any 104(c) citation were set forth specifically with regard to the 104(c) (1) notice, and that Congress intended that they be carried forward by implication to the portions of section 104(c) dealing with withdrawal orders. 3 IBMA at 349-350, 352-353, 81 I.D. 575, 576-7. One of those tests that we held applicable to any 104(c) order was the gravity criterion for which Zeigler and BCOA argue herein.

In *Eastern*, *supra*, we sought to interpret the ambiguous language of section 104(c) so that its enforcement would harmonize with the administration of other enforcement tools provided to the Secretary in the Act and would effectuate the Congressional purposes as we understood them. We particularly made an effort to avoid any interpretation which carried the potential for absurd results. 3 IBMA at 353. In the briefs submitted by the parties to the instant appeal, nothing has been written to cause us to modify the views expressed in *Eastern*, *supra*.¹⁰ We therefore re-

affirm our analysis and conclusions set forth in our opinion in *Eastern* and hold them to be dispositive of the question at hand. We conclude that Zeigler and BCOA were and are correct in their contention that the record must show that the violation in question could have significantly and substantially contributed "to the cause and effect of a mine safety or health hazard."

In applying this gravity requirement to the facts in *Eastern*, we took the view that the phrase "* * *" significantly and substantially contributed to the cause and effect of a mine safety or health hazard "* * *" in section 104(c) referred to violations posing a probable risk of serious bodily harm or death and that an inspector's conclusion to that effect was to be evaluated by the traditional, objective standard of the reasonable man. 3 IBMA at 355, 81 I.D. at 578. Focusing our attention on the relevant evidence of the instant record, we note that the inspector testified in effect that the alleged accumulation did not pose a grave threat to life and limb and MESA does not now suggest that there is any evidence which would support a contrary conclusion (Tr. 70, 74). On the basis of the narrow circumstances revealed by this case record, we find that a reasonable man would conclude that the violation cited in the instant withdrawal order did not pose a probable risk

¹⁰ We note in passing that the parties have extensively argued the inferences to be drawn from the legislative history. We believe these analyses and the inferences that they draw from the ambiguous events noted in the legislative history offer nothing conclusive or persuasive that illuminates legislative intent or motive. We have found particularly un-

persuasive comparisons of section 104(c) to portions of statutory ancestors of the Act since the Congress took the trouble to repeal them *in toto* rather than to amend. 83 Stat. 803 (1969).

of serious bodily harm or death. Accordingly, it is the judgment of the Board that the violation could not have significantly and substantially contributed "to the cause and effect of a mine safety or health hazard" and that therefore the decision below must be overturned.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), oral argument in the above-captioned docket IS DENIED and the decision appealed from IS REVERSED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.
Chief Administrative Judge.

THE VALLEY CAMP COAL COMPANY

3. IBMA 463

Decided December 13, 1974

Appeal by the Valley Camp Coal Company from a Supplemental Decision by an Administrative Law Judge issued May 9, 1974, assessing a penalty in the amount of \$500 for a violation of the Federal Coal Mine Health and Safety Act of 1969. Docket No. MORG 72-78-P.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Negligence

A pre-shift examination report by a State certified examiner indicating that a mine area is free from violations of Federal and State law does not preclude a finding that the mine operator was negligent where a violation of Federal law is subsequently found in the area by a federal inspector.

2. Federal Coal Mine Health and Safety Act of 1969: Penalties: Negligence

A section foreman's knowledge of a dangerous condition may be imputed to the operator for the purpose of determining the negligence criterion in assessing a civil penalty under section 109 of the Act.

APPEARANCES: Arthur M. Recht, Esq., for appellant, The Valley Camp Coal Company; Michael T. Heenan, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

This appeal concerns Order of Withdrawal No. 1 AK, written in the Valley Camp Coal Company's (Valley Camp) Alexander Mine on March 22, 1971. The order cited the following conditions as constituting an imminent danger in the mine:

Dangerous accumulations of float coal dust deposited on rockdusted surfaces was present in No. 2 belt conveyor in 4 south section off 16 east mains for a distance of 350 feet from the loading point inby. Dangerous accumulations of loose coal and coal dust were present in the Nos. 1, 2 and 3 entries for distances of 200 feet outby the faces and these areas

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were observably inadequately rockdusted. The trailing cable of the serial No. 4229 continuous mining machine had exposed power conductors in numerous places. The trolley feeder wire was inadequately insulated for a distance of 100 feet in the shuttle car haulway.

In its Petition for Assessment of Civil Penalty, the Mining Enforcement and Safety Administration (MESA) charged the operator with violations of 30 CFR 75.400 and 75.403 for the conditions set forth in the order. No assessments were requested for the faulty trailing cable and the uninsulated trolley feeder wire. At a hearing held in Pittsburgh, Pennsylvania on December 4, 1973, testimony was given by the inspector who issued the order and by two witnesses for Valley Camp. The Administrative Law Judge (Judge) in his decision, sets out detailed findings of fact and concludes that the conditions described in the Order were proved, were violations, were serious, and were the result of negligence on the part of the operator. The Judge included the faulty trailing cable and the uninsulated trolley feeder wire in his consideration of seriousness of the loose coal, coal dust, and float coal dust accumulations. He noted also that this was Valley Camp's fifth violation of 30 CFR 75.400 in a 5-month period and assessed a penalty of \$500 therefor. The Judge dismissed MESA's Petition to the extent it sought assessment of a penalty for a violation of 30 CFR 75.403 because no dust samples were taken to support a citation for inadequate rock dust.

Issue

The sole issue raised by the Valley Camp Coal Company (the operator) on appeal to this Board is whether the judge erred in finding the operator negligent in allowing an extensive accumulation of loose coal, coal dust and float coal dust to occur. The fact that this condition constituted a violation of the mandatory standard set forth in 30 CFR 75.400 is not in issue.

Contentions of the Parties

The operator contends that "it was without any negligence whatsoever in that it relied upon the pre-shift examiner's report that the section involved in this matter was completely clear and free from any known and existing violations of State or Federal Law." The pre-shift examination and report were made by an examiner certified to make such examinations under West Virginia law. It appears that under West Virginia law every operator is required to employ such a mine examiner who must hold a certificate of competency issued by the State's department of mines.¹ The examiner's qualifications and competency to make the pre-shift examination and report are not here in question. It further appears that in the performance of their statutory duties, such examiners are representatives of the State, not the mine operator or the miners. Valley Camp argues that it justifiably relied on such an

¹ West Virginia Code, Chapter 22, Article 2, Section 20.

examiner's pre-shift report, and states in its brief that "If this record did not contain the antiseptic pre-shift examination then the operator could not justifiably claim any immunity from a finding of negligence."

The Mining Enforcement and Safety Administration (MESA) argues that the evidence adduced at the hearing does not support the operator's contention that it relied on the pre-shift examination report. In support of this argument MESA points to the testimony of the section foreman that he made his own inspection of the section involved after reading the pre-shift examination report. MESA concludes from this that no reliance was placed on the report. MESA further argues that even if the operator's contention of reliance on the report were supported by the record, such reliance would be inconsistent with Congressional intent. MESA's position is that section 2(e) of the Act² places upon the operator (as defined in section 3(d) of the Act) the primary responsibility for the health and safety of the miners because it is the operator who has the right to control his employees. Therefore, MESA argues, a pre-shift examiner who acts pursuant to state law and has no supervisory powers over the operator's employees, cannot fit the statutory definition of an operator. Thus, MESA concludes that an operator cannot exculpate himself from the high degree of care imposed upon him by

the Federal Act by relying upon a pre-shift examination report made pursuant to State law.

Discussion

The question of negligent conduct by an operator is frequently a close one and one which must be decided on a case-by-case basis. The real question we are called upon here to decide is whether the operator knew or with the exercise of reasonable diligence should have known of the conditions constituting the violation, and whether the operator exhibited the degree of care required of him. Although the question of whether the operator was negligent is not a necessary element to the finding of a violation, it must be decided and considered in determining the amount of the penalty to be assessed. Section 109(a)(1), 30 U.S.C. § 819(a)(1).

In this case the operator contends in effect that not only did he not know and could not have known of the presence of the violation, but asserts that he was fully justified in relying upon the pre-shift examiner's report indicating there were no violations; *i.e.*, that the pre-shift report served as a complete shield from a finding of negligence and that there was no duty to go behind the report. We disagree.

[1] We are impressed, as was the Judge in his decision, by the testimony of Valley Camp's Health and Safety Manager and the Section Foreman of the section involved. The Manager testified that when a section foreman arrives on a section,

² 30 U.S.C. §§ 801-960 (1970).

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he is *required* to make his own independent examination of the section and if he finds dangerous conditions, such as accumulations of loose coal, coal dust and float coal dust, he is *obligated* to take corrective action regardless of what the pre-shift examiner's report may have shown. The Section Foreman testified that he was aware that the Lee Norse miner in use did not clean up all loose coal in a satisfactory manner, and further testified that it required about five hours to eliminate the accumulation in his section on the day the violation was charged by the Federal Inspector. From this testimony, the Judge concluded that Valley Camp could not rest upon the pre-shift examiner's report and on the basis of all the evidence, the Judge made a finding that the operator was negligent in allowing the extensive accumulations to occur, and assessed a penalty of \$500. We agree.

[2] We believe it reasonable to conclude from the evidence in the record that it was the established policy, or at least the customary practice, of the operator to require the section foremen to make their own independent inspections of the sections under their control for the purpose of discovering any dangerous conditions or violations, and to take such corrective action as indicated. In the instant case the record is clear and we find that the section foreman knew or should have known of the dangerous accumulations of loose coal and coal dust but apparently did nothing about it un-

til the condition was cited by the Federal inspector. Therefore, we conclude that the section foreman was guilty of negligent conduct in not taking any action to correct the dangerous condition or bringing it to the attention of his superiors. We are further of the opinion and hold that the section foreman is in charge of the work production in his section and his relationship to the operator is sufficient whereby his knowledge of the condition may be imputed to the operator.³ Consequently, we hold that the operator was negligent in permitting the condition to occur.

Finally, we agree with the position taken by MESA that the record in this case does not support a finding that the operator in fact relied upon the pre-shift examination report. We are further in agreement with MESA that even if the operator had so relied, it was not the legislative intent to permit him to exculpate himself of the high degree of care imposed upon him under the Act by relying upon a report made pursuant to State law by a person not directly responsible to him. The Act places primary responsibility for the health and safety of miners upon the operator.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

³ *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P. 2d 1 (1948); *Deserant v. Cerillos Coal RR. Co.*, 178 U.S. 409, 20 Sup. Ct. 967 (1900).

CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS AFFIRMED.

IT IS FURTHER ORDERED, that Valley Camp Coal Company pay the penalty assessed by the Judge in the amount of \$500 on or before thirty days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

MOUNTAINEER COAL COMPANY

3 IBMA 472

Decided *December 20, 1974*

Appeal by the Mining Enforcement and Safety Administration from a decision in Docket No. MORG 72-6-P by an Administrative Law Judge dismissing a civil penalty proceeding with prejudice and vacating an order of withdrawal.

Modified in part and reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Dismissals

It is an abuse of discretion by an Administrative Law Judge to grant a motion by MESA to withdraw part of a petition for assessment of civil penalties *with* prejudice, when by granting such motion *without* prejudice, the effect of foreclosing the Secretary's enforcement agency (MESA) from litigating *all* the

violations alleged in a withdrawal order on their merits can be avoided.

30 U.S.C. § 819(a) (1), 43 CFR 4.512.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

The validity of the withdrawal order is not an issue in a proceeding to assess civil penalties for violations alleged in such withdrawal order; thus, an Administrative Law Judge is without authority to vacate such order in such proceeding.

30 U.S.C. § 819(a) (3), *Zeigler Coal Co.*, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973).

APPEARANCES: J. Philip Smith, Esq., Assistant Solicitor, Robert J. Phares, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; John A. Macleod, Esq., James T. Hemphill, Esq., for appellee, Mountaineer Coal Company.

OPINION BY ADMINISTRATIVE JUDGE DOANE INTERIOR BOARD OF MINE OPERATIONS APPEALS

We are called upon here to consider the proper construction and application of the Secretary's regulation concerning withdrawal of pleadings in the context of a penalty proceeding filed by the Mining Enforcement and Safety Administration (MESA) pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.¹ In the past, we have dealt at length with withdrawal problems in *Ranger Fuel Corporation*² and *United*

¹ 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² 2 IBMA 186, 80 I.D. 604, 1973-1974 OSHD par. 16,541 (1973).

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*States Fuel Company.*² This case differs from those cases in that, here, the amended version of the regulation is applicable. 43 CFR 4.512, 38 FR 14170 (May 30, 1973).

Procedural Background

MESA instituted this proceeding against Mountaineer Coal Company (Mountaineer) for assessment of civil penalties by filing an appropriate petition on August 19, 1971. The petition involved 24 alleged violations of the mandatory health or safety standards as described in 13 notices of violation and three withdrawal orders. At a prehearing conference held on March 28, 1973, the 13 notices were vacated upon the Government's motion for reasons not relevant to this appeal. Subsequently, a Notice of Hearing was issued setting August 28, 1973, as the date for the hearing on the merits with respect to the violations involved in the withdrawal orders.

Approximately two weeks prior to the hearing, on August 15, 1973, the Government filed a Motion to Amend its petition, seeking *inter alia*, to add nine alleged violations set forth in the Order of Withdrawal 1 LLL, dated December 29, 1970. The original petition, with respect to this particular withdrawal order, had listed four violations under various substantive provisions of the Act. The subject withdrawal

order itself reveals the reason why MESA's counsel omitted the additional allegations of violation in the original petition. The four violations originally alleged were listed on the first page of the withdrawal order. The additional allegations which MESA later desired to add to the petition were itemized on a continuation sheet of the withdrawal order to which no reference was made on the first page. It is obvious that counsel for MESA simply overlooked the continuation sheet when preparing the original petition. Since the allegations requested to be added were listed on the continuation sheet of the withdrawal order served upon Mountaineer, and the withdrawal order, including the continuation sheet, was made an attachment to the original petition, MESA argued that Mountaineer would not be prejudiced by the granting of the motion because it had notice of the alleged violations desired to be added from the time the withdrawal order was first issued.

Although no written objection to the motion was filed by Mountaineer, the Judge did not rule on the motion until the parties were present and ready for the hearing. At the hearing, the Judge denied leave to amend, ruling that the Government should have requested the desired amendments at the March prehearing conference and that the motion was untimely. Contrary to MESA's assertion that there would be no prejudice, he concluded that granting the motion would not give

² 2 IBMA 315, 80 I.D. 739, 1973-1974 OSHD par. 16,954 (1973).

Mountaineer sufficient time to prepare its defense with respect to the additional charges.

Its motion to amend having been denied, MESA then moved to withdraw the portion of its petition relating to Order 1 LLL, claiming as authority 43 CFR 4.512. This procedural maneuver was designed to pave way for filing a new petition pertaining to the same withdrawal order, charging *all* the violations listed therein.

Reasoning in substance that allowing MESA to perform in this fashion in effect would unduly restrict the usual discretion of a trier of fact over amendments to pleadings, the Judge decided to grant the motion to withdraw but did so *with* prejudice. By decision dated August 31, 1973, he vacated the subject withdrawal order and declared the case closed.

MESA then filed a timely Notice of Appeal with the Board. Thereafter, both MESA and Mountaineer filed timely briefs.

Issues on Appeal

A.

Whether the Administrative Law Judge abused his discretion by granting MESA's motion to withdraw *with* prejudice.

B.

Whether the Administrative Law Judge erred by vacating a withdrawal order issued under section 104(a) of the Act in the course of adjudicating a civil penalty pro-

ceeding brought pursuant to section 109(a) (3) of the Act.

Discussion

A.

The Secretary's withdrawal regulation, 43 CFR 4.512, reads as follows:

(a) Except as provided in paragraph (b) of this section, a party may withdraw a pleading at any stage of a proceeding without prejudice.

(b) A petition for civil penalty assessment filed by the Bureau under section 109(a) of the act may be withdrawn only upon the motion of Bureau or in the case of an operator-filed petition for hearing and formal adjudication with the Bureau's concurrence.

For the purpose of deciding the appeal at hand, we need concern ourselves only with paragraph (a) of the regulation.

In *United States Fuel Company, supra*, we held that where a party elects to withdraw a pleading under 43 CFR 4.512, the effect of the withdrawal is a discretionary matter for the initial determination of the Judge. We further indicated that where a Judge abuses his discretion in deciding the effect to be accorded to the withdrawal and then acts thereupon to the prejudice of the withdrawer, such action constitutes reversible error.

[1] The Judge's action in denying the motion to amend and also granting the motion to withdraw, but *with* prejudice, was prompted by a desire to avoid prejudicing the procedural right of Mountaineer to have adequate time in which to pre-

December 20, 1974

pare its substantive defense. While we agree that Mountaineer needed more time to prepare, we do not believe that the Judge ruled correctly. Since MESA was seeking only to amend its pleading by use of the withdrawal procedure in order to obtain adjudication of *all* of the violations cited in the withdrawal order involved in the original petition for assessment, we are of the opinion that the inclusion of additional charges would not have drastically widened the scope of the hearing to the prejudice of Mountaineer.

We observe that section 109(a) (1) of the Act constitutes a mandate to the Secretary to assess a civil penalty against the operator of a coal mine in which a violation of a mandatory health or safety standard occurs. It is, therefore, our further opinion that it is incumbent upon the Administrative Law Judges to avoid, when possible, procedural rulings which have the effect of foreclosing the Secretary's enforcement agency (MESA) from litigating penalty cases on their merits.

In the circumstances of this case, the Judge had the discretion to choose one of two alternative courses of action; either to allow the amendments, or to grant the motion to withdraw *without* prejudice. In our view, allowing the requested amendments to the petition was the preferable alternative. He could then have given Mountaineer a rea-

sonable time to prepare for trial by simply continuing the date for hearing.⁴ Accordingly, it is the judgment of the Board that the Judge abused his discretion in granting the motion to withdraw *with* prejudice.

MESA contends in its brief that it has an *absolute* right under 43 CFR 4.512 to withdraw its petition without prejudice at any time in the course of a proceeding before decision. The Judge in his decision and Mountaineer in its brief contend that to construe the regulation to permit such a right, in effect, would be to condone forum shopping or otherwise deny administrative due process. Since, under the circumstances here, it is clear that the motion to withdraw was made for the purpose of correcting a clerical inadvertence and not for the purpose of forum shopping, we shall await the appropriate case to rule on the "absolute right" question.

B.

[2] With respect to the second issue raised by this appeal, MESA cites *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), as dispositive. We agree that *Zeigler* is dispositive and affirm our holding there that an Administrative Law

⁴ We note that the Judge here waited until the date of the hearing to rule on MESA's motion to amend. Had he granted the motion promptly, Mountaineer would have had nearly two weeks to prepare.

Judge may not vacate an imminent danger withdrawal order issued under section 104(a) of the Act when adjudicating a penalty proceeding for violations alleged in such withdrawal order. The issues to be decided in the penalty proceeding are whether the conditions or practices cited in the withdrawal order constitute violations of mandatory health or safety standards, and, if so, what assessments are appropriate.

We hold, therefore, that the Judge erred in vacating Order of Withdrawal No. 1 LLL, dated December 29, 1970.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

(1) That the decision in the above-captioned docket is MODIFIED by granting MESA's motion to withdraw, but *without* prejudice to the filing of another petition for the assessment of civil penalties pertaining to the violations alleged in Withdrawal Order No. 1 LLL, dated December 29, 1970; and

(2) That the Judge's order vacating said Withdrawal Order is hereby VACATED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

ARMCO STEEL CORPORATION

3 IBMA 482

Decided *December 22, 1974*

Appeal by Mining Enforcement and Safety Administration (MESA) from an order of an Administrative Law Judge (Docket No. HOPE 74-57-P, et al),¹ dated May 9, 1974, dismissing ten Petitions for Assessment of Civil Penalty filed by MESA pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969² hereinafter "the Act."

Order amended.

1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

Default procedures of 43 CFR 4.544 for failure to appear at a scheduled prehearing conference apply solely to a party against whom a penalty is sought and may not be invoked against MESA.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Madison McCulloch, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; William C. Payne, Esq., for appellee, Armco Steel Corporation.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
ROGERS

INTERIOR BOARD OF MINE
OPERATIONS APPEALS

¹ The ten dockets consolidated in Docket No. HOPE 74-57-P are Docket Nos. HOPE 74-57-P, 74-60-P, 74-62-P, 74-72-P, 74-74-P, 74-78-P, 74-81-P, 74-147-P, 74-163-P, and 74-201-P.

² 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

December 23, 1974

Factual and Procedural Background

On September 10, 1973, the Mining Enforcement and Safety Administration (MESA) filed with the Office of Hearings and Appeals the ten Petitions for Assessment of Civil Penalty involved in this appeal. Armco Steel Corporation (Armco) filed answers to the Petitions for Assessment on October 9, 1973. By Order, dated March 25, 1974, the Administrative Law Judge (Judge) scheduled a prehearing conference in each of the ten cases for April 23, 1974. On April 16, 1974, MESA filed a motion for continuance of the conference in one of the ten dockets, which motion was denied by the Judge on April 17, 1974. The Judge held the prehearing conference on April 23, 1974, and, since MESA did not appear, the Judge issued an order on April 23, 1974, requiring MESA to show cause why it should not be held in default and the cases dismissed for lack of prosecution. On April 25, 1974, MESA filed a motion for extension of time to respond to the show cause order. On April 29, 1974, Armco filed a statement with the Judge stating that it did not desire dismissal of the cases because MESA failed to attend the prehearing conference and that it "takes no position on whether this tribunal under the circumstances has the power and the grounds for dismissing the cases." Further, Armco concluded "that it should not seek dismissal of the cases * * *," and urged

the Judge to permit the parties to consummate the settlement and proceed to hearing on the unsettled alleged violations. The motion by MESA for extension of time was denied in the Judge's Order of May 9, 1974, in which he also dismissed all ten dockets due to MESA's default at the prehearing conference.

MESA filed a timely Notice of Appeal and brief with this Board contending that the Judge lacked authority to dismiss the above Petitions for Assessment pursuant to the procedure set forth in 43 CFR 4.544 and that the Judge acted in an "arbitrary and capricious manner" in dismissing these cases. Armco did not participate in this appeal.

Issue Presented

Whether the Judge has authority to subject MESA to the default procedure set forth in 43 CFR 4.544.

Discussion

The brief filed by MESA sets out a chronological review of the events leading up to the Judge's order dismissing the petition for assessment of civil penalty. In sum it shows a series of misunderstandings and general lack of communication between counsel for MESA and the Judge. Events culminated with the failure of MESA counsel to attend the prehearing conference. The reasons given for failure to attend according to MESA's brief, were the illness of counsel, his belief that all cases had been settled and his belief that his motion to continue the pre-

hearing conference had been granted (when in fact it had been denied). Following the failure of MESA counsel to attend the prehearing conference the Judge, on April 23, 1974, issued an order directing MESA to show cause why its recorded default should not be reaffirmed and the case dismissed for lack of prosecution.

It is apparent that misunderstandings and general lack of communication between counsel for MESA and the Judge are largely responsible for the actions resulting in this appeal. We can understand the frustration of the Judge, after having called a prehearing conference and while trying to expedite penalty assessment proceedings, when counsel for MESA failed to appear apparently without advising either the Judge or counsel for the respondent of his intention not to appear.

Nevertheless, we are confronted with a challenge to the authority of the Judge to hold MESA in default under 43 CFR 4.544 and dismiss these petitions for assessment of civil penalty, apparently with prejudice.

In *United States Fuel Company*, 2 IBMA 315, 321, 80 I.D. 739, 742, 1973-1974 OSHD par. 16,954 (1973), the Board stated in pertinent part:

In this, as in other matters committed to the sound discretion of the Judges and of this Board, we must act with caution in order to avoid abuse of our delegated authority. We may fill in the interstices of a regulation, but we must avoid in-

terpretations which are in reality amendments and amount to rulemaking.* * *

In *Kings Station Coal Corporation*, 2 IBMA 291, 80 I.D. 711, 1973-1974 OSHD par. 16,879 (1973), we ruled it would be improper to permit a Judge to lift the default decision powers of 43 CFR 4.544 out of context and combine them with summary decision powers of 43 CFR 4.590. In that case, we concluded that the Secretary's delegation of authority in 43 CFR 4.1(4), even when considered in light of the provisions of 43 CFR 4.505, did not allow such action.

In the instant case, the Judge has misapplied the default procedures of 43 CFR 4.544, which relate solely to the *respondent* in a penalty proceeding. The "Assessment of Civil Penalties" section of the regulations 43 CFR 4.541 makes clear that the term "respondent" refers only to the party against whom a penalty is sought.

Section 109(a) of the Act provides that where a violation of the Act is established, a penalty must be assessed. In the instant case, MESA filed Petitions for Assessment which Armco answered. Due to the Judge's dismissal of these Petitions for Assessment prior to hearing and decision on the merits, the question of whether a violation occurred is unanswered. If, in fact, a violation did occur, the Judge, by dismissing these cases, would be violating the Act's mandate of assessing penalties when violations occur.

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We should add that under the provisions of section 109(a) of the Act and the Secretary's procedures thereunder the hearing process is a right afforded to a party against whom a penalty is sought. So on the one hand we have the Congressional mandate to the Secretary to assess civil penalties and on the other hand the statutory right of opportunity for public hearing granted to the party charged. To permit default by MESA would not only be inconsistent with such Congressional mandate but would frustrate the right of the person charged to a public hearing where he so desires.

Since the published regulations of the Secretary clearly set forth procedures for default in penalty proceedings it follows that the authority of the Judge was intended to be limited and proscribed thereby. Thus we have no alternative but to find that under the circumstances of this case the Judge did not abide by the procedural regulations in dismissing these penalty assessment proceedings.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's order in the above-captioned case IS AMENDED to specify that the dismissal is without prejudice to the refile by MESA of the ten peti-

tions for assessment of civil penalties involved herein.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,

Administrative Judge.

KAISER STEEL CORPORATION

3 IBMA 489

Decided December 24, 1974

The Mining Enforcement and Safety Administration appeals a decision by an Administrative Law Judge to the extent that it vacated thirteen citations of violations described in Notices and Orders in a section 109(a) proceeding under the Federal Coal Mine Health and Safety Act of 1969. (Docket Nos. below: DENV 73-86-P; DENV 73-46-P; DENV 73-89-P.)

Affirmed in part and reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Evidence of individual accumulations of coal dust standing alone will not support a charge that the operator failed to establish and maintain a regular cleanup program, particularly where there is evidence that a cleanup program existed and was generally maintained.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where the operator's employees test the roof as provided by 30 CFR 75.205 there is no violation of that section.

3. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Alleged violations of "permissibility" requirements of electric face equipment are established where conditions described as violations are obviously in deviation of, or contrary to, specifically promulgated "permissibility" specifications in 30 CFR Part 18.

4. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

A return air course, in which the operator's employees work and travel is an "active working" under 30 CFR 75.2 (g) (4) and for that reason subject to 30 CFR 75.400 (section 304(a) of the Act) proscribing accumulations of coal dust, loose coal and other combustible materials in "active workings."

APPEARANCES: Gayle E. Manges, Esq., for appellant, Mining Enforcement and Safety Administration; W. J. Lindgren, Esq., for appellee, Kaiser Steel Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On June 9, August 17, October 24 and 30, 1972, Kaiser Steel Corporation (Kaiser) filed petitions pursuant to 43 CFR 4.540 for formal adjudication of violations alleged in notices and orders issued by the Mining Enforcement and Safety Administration (MESA). A hear-

ing on the petitions was held at Santa Fe, New Mexico, on February 7, 8, and 9, 1973. In his initial decision, dated August 7, 1973, the Administrative Law Judge (Judge) assessed penalties in the amount of \$2,625 for violations of the Federal Coal Mine Health and Safety Act (Act).¹ He vacated three notices of violation under Docket No. DENV 73-36-P, nine citations of violation described in five orders of withdrawal,² and one notice under Docket No. DENV 73-86-P. The thirteen vacated items, all concerning Kaiser's York Canyon No. 1 Mine, are the subject of MESA's appeal to this Board.

Timely briefs were filed by both MESA and Kaiser.

Issues Presented on Appeal

I.

Whether individual accumulations of coal dust will support violations of 30 CFR 75.400-2, requiring the establishment and maintenance of a cleanup program.

II.

Whether roof testing, as required by 30 CFR 75.205, is complied with

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The Judge actually dismissed the orders in which the violations were described. We point out, however, that the validity of withdrawal orders is not in issue in a penalty assessment proceeding under section 109 of the Act. *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,603 (1973). The procedure followed in this instance was that alleged violations giving rise to the withdrawal orders were, in effect, also vacated.

where the operator's roof bolting crew tested the roof as a matter of routine after installation of roof bolts.

III.

Whether, in addition to substantive descriptions of alleged "permissibility" violations of electric face equipment, the dates of manufacture of the equipment cited must be established to prove such violations.

IV.

Whether a return air course is an "active working" as defined by 30 CFR 75.2(g) (4), and subject to the requirements of 30 CFR 75.400 (section 304(a) of the Act), proscribing accumulations of combustible materials.

Discussion

For sake of convenience, the discussion which follows is organized in the same order as the above listing of the issues. Thus, each group of alleged violations having a common issue will be discussed hereinafter under the appropriate numeral.

I.

Notice Nos. 1 CR, 12/28/71, 1 CR, 1/12/72, and 1 CR, 1/13/72

The text of each of these Notices is as follows:

Coal float dust was permitted to accumulate in the return air course of 2nd section for a distance of about 100 feet.

Float coal dust was permitted to accumulate on top of the rockdusted surface along the main conveyor belt outby the 4 left belt drive.

Float coal dust was present in the immediate return air course in second north section for a distance of about 400 feet.

In each case the operator was charged with a violation of 30 CFR 75.400-2 which reads as follows:

A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to the Secretary or authorized representative.

The Board is aware that the validity of 30 CFR 75.400-2 is in question before the courts;³ however, in view of our disposition of this appeal the validity or invalidity of the regulation is of no moment and we express no view thereon.

We note first that the charges as cited in the three Notices on appeal allege accumulations of float coal dust in three separate instances and were issued on three separate occasions. The descriptions are essentially the same and the charges are similar if not identical to charges for violations of 30 CFR 75.400 (section 304(a)) of the Act. MESA rests its case upon proof that the accumulations existed.

It is not disputed that the individual accumulations as described in the Notices actually occurred. At the hearing, the MESA inspector described the coal dust accumula-

³ This regulation was declared invalid on March 13, 1974, by the United States Court of Appeals for the Sixth Circuit in *U.S. v. Finley Coal Company, et al.*, 493 F. 2d 285 (1974). A petition for writ of certiorari was filed October 4, 1974, with the Supreme Court of the United States and assigned docket Number 74-382.

tions which prompted him to write each Notice. He stated that one of them could have occurred over a very short period of time (Tr. 104). The inspector conceded that Kaiser had a cleanup program but thought it was not properly maintained (Tr. 24, 106).

Kaiser's mine superintendent testified at length as to the existence, characteristics, and routine of the operator's cleanup program (Tr. 38, 108-9, 126-8). This testimony was not refuted.

The Judge held that while the evidence presented by MESA might have proved violations of 30 CFR 75.400 it did not prove violations of 30 CFR 75.400-2 as charged. He therefore vacated the three Notices.

[1] We agree, and affirm the Judge's decision on this point. Proof of the existence of accumulations of float coal dust standing alone will not support a finding that the operator did not have a cleanup program, particularly where the evidence shows the existence of such program.

II.

Notice No. 4 WJB, 9/14/71

This Notice alleged a violation of 30 CFR 75.205, in that the operator of the continuous mining machine failed to examine and test the roof, face, and ribs before the extraction of coal had started in the belt entry of 5 right working section.

30 CFR 75.205 merely recites the provisions of section 302(f) of the Act, as follows:

Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety. When dangerous conditions are found, they shall be corrected immediately.

In section 3(d) of the Act, "operator" is defined as follows:

"Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine.

The inspector testified that he issued this Notice upon observing the operator of the continuous mining machine pulling out of one entry, backing the machine through the crosscut, and entering into the face of the belt entry, without first testing the roof, face, and ribs (Tr. 437). The inspector pointed out that in the Coal Mine Safety Inspection Manual For Underground Mines (Manual), the word "operator" in 75.205 should be taken to mean the employee who actually operates the continuous mining machine.⁴ The inspector further testified that he was not present in the entry in question before the continuous mining machine came into it and that, therefore, the required examination *could* have been made by either the face boss, section boss or roof-bolting crew without his (the inspector's) knowledge or observation (Tr. 438-441). The record indicates that the roof-bolting crew had com-

⁴ The July 1971 edition of the Manual states: "75-205 roof testing. The word 'Operator' in this provision means the equipment operator."

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pleted bolting the roof in this entry just prior to the inspection and that the continuous mining machines had not proceeded beyond the line of roof bolting. The operator's mine superintendent, Mr. Starkovich, testified that it was the responsibility of the roof-bolting crew to make the checks required by section 75.205 (Tr. 448). He (Starkovich) did not personally observe, however, whether the checks actually were made in this instance.

The Judge vacated this Notice on the ground that the evidence presented by MESA was insufficient to prove that the "operator" as defined in section 3(d) of the Act failed to make the required tests, *i.e.*, that the tests were not in fact made. We agree.

[2] MESA argues that "operator," as defined in the Inspection Manual is reasonable and consistent with the Act. This may well be; however, the Manual is intended primarily to provide MESA inspection personnel with guidelines for use in conducting inspections pursuant to the Act and serves only incidentally the purpose of acquainting the industry and others with the procedures and guidelines to be used in the administration of the Act. The Inspection Manual does not have the status of an official regulation of the Secretary. Although we recognize that copies of the Manual may be in wide circulation in the industry, we do not believe that coal mine operators can properly be held to comply with guidelines or amplifications of the Act not properly

promulgated as regulations issued pursuant thereto. Nowhere in the record does it appear that the roof-bolting crew assigned by the mine superintendent to test the roof was incompetent to do so or that this test was not performed as an incident to specific employment requirements by the mine operator. Therefore, we find that the Judge properly vacated this Notice on the ground that it was not proved by a preponderance of the evidence that the mine operator failed to make the test required by 30 CFR 75.205.

III.

Under this issue we deal with conditions alleged to be violations of 30 CFR 75.503 and 75.505 relating to "permissibility" of electric face equipment, described in *Orders of Withdrawal Nos. 1 ACH 6/7/71, 2 CR 6/22/71, 1 JHT 8/9/71 and 1 JHT 7/27/71.*

The eight alleged violations are described by the MESA inspector as follows:

1 ACH 6/7/71

One studbolt was loose on the cover plate for the controls and the lens was loose on the right headlight allowing an opening in excess of 0.007 inch on the continuous mining machine in 1 left section off three left.

2 CR 6/22/71

Conduit was not properly installed on the right hand light on the continuous mining machine.

Conduit was not properly installed on the right traction motor of No. 4 shuttle car.

1 JHT 8/9/71

1. An opening in excess of .007 inch was present in the step flange joint of pump motor No. 5 shuttle car.

2. A lock washer was missing from bolt of panel box No. 5 shuttle car.

3. An opening in excess of .007 inch was present in step flange joint of conveyor motor No. 2 shuttle car.

4. The cable reel of No. 2 shuttle car was not insulated adequately.

1 JHT 7/27/71

Cable guide sheeve [sic] wheel was not in operating condition on No. 2 shuttle car.

The two regulations, 30 CFR 75.503 and 75.505, under which Kaiser was cited, provide, respectively, as follows:

[503] The operator of each coal mine shall maintain in permissible condition all electric face equipment required by secs. 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

[505] Any coal mine which, prior to March 30, 1970, was classed gassy under any provision of law and was required to use permissible electric face equipment and to maintain such equipment in a permissible condition shall continue to use such equipment and to maintain such equipment in such condition.

"Permissible" as applied to electric face equipment, is defined in 30 CFR 75.2(i) as follows:

* * * all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and

the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; * * *

In vacating the above-listed eight alleged violations, the Judge relied on 30 CFR 75.506 in which Schedule 2G is incorporated by reference.⁶ The Judge found that in absence of evidence as to the date of manufacture of the equipment in question, he could not determine which, if any, of the four schedules set forth the applicable permissibility standards. Consequently, he concluded that the violations alleged in the four Orders had not been proved, and should be vacated.

It is MESA's position that Bureau of Mines Schedule 2G, referred to in 30 CFR 75.506, contains the

⁵ Use of the term "permissibility," as defined above, recurs throughout 30 CFR 75.500.

⁶ 30 CFR 75.506 provides in part:

"(a) Electric-driven mine equipment and accessories manufactured on or after March 30, 1973, will be permissible electric face equipment only (1) if they are fabricated, assembled, or built under an approval, or any extension thereof, issued by the Bureau of Mines or the Mining Enforcement and Safety Administration in accordance with schedule 2G, or any subsequent Bureau of Mines schedule promulgated by the Secretary after March 30, 1970, which amends, modifies, or supersedes the permissibility requirements of schedule 2G, and (2) if they are maintained in a permissible condition.

"(b) Except as provided in paragraph (c) of this sec. 75.506 electric-driven mine equipment and accessories manufactured prior to March 30, 1973, will be permissible electric face equipment (1) if they were fabricated, assembled or built under an approval, or any extension thereof, issued by the Bureau of Mines in accordance with the schedules set forth below, and (2) if they are maintained in a permissible condition."

Bureau of Mines Schedule 2D, May 23, 1936; Bureau of Mines Schedule 2E, February 15, 1945; Bureau of Mines Schedule 2F, August 3, 1955; Bureau of Mines Schedule 2G, March 19, 1963.

data applicable to the equipment here cited for permissibility violations. MESA also asserts that Schedule 2G was in evidence at the hearing, is set forth in 30 CFR 18, and that in the case of equipment manufactured prior to the date upon which Schedule 2G became applicable, the burden is on the operator to show that Schedule 2G is not applicable.

Kaiser contends that the Judge's decision should be affirmed on the ground that MESA failed to show how the cited conditions were in violation of any mandatory health or safety standard at the time the alleged citations were issued.

[3] For reasons which follow we think that the described permissibility violations were proved by MESA and must be reinstated. Sections 75.503 and 75.505 require that electric face equipment be permissible and maintained in permissible condition. Under subsection (a) of section 75.506 permissibility depends on two items: (1) the equipment must have been built according to Schedule 2G or modification thereof; and (2) it must be maintained according to such schedule or modification. Schedule 2G contains the substantive prerequisites of permissibility for various electric-driven mine equipment and accessories. (Schedule 2G is identical to 30 CFR Part 18 and appeared in the Federal Register on March 19, 1968, Vol. 33, No. 54.)

[3] A study of Schedule 2G indicates that the specifications contained therein do not govern equip-

ment as to its vintage or date of manufacture. Rather, these specifications are applicable generally to:

* * * electrically operated machines and accessories intended for use in gassy mines or tunnels, * * *.⁷

Therefore, we find the Schedule 2G is the document containing the Secretary's published specifications looking toward assurance that electric face equipment and accessories will not cause a mine explosion or mine fire.⁸ We note, for example, that Appendix II of Schedule 2G lists various conditions which must be satisfied to retain permissibility or safety equipment. One of these conditions is that "all bolts, nuts, screws, and other means of fastening and also threaded covers, shall be in place, properly tightened and secured." A failure of this condition was cited in Order No. 1 ACH, 6/7/72. Appendix II also includes diagrams of various joints for explosion-proof enclosures and conduit entrance assemblies accompanied by critical maximum, minimum, and radial clearances. Thus, a maximum clearance of 0.006 inches is shown for the type of joint cited as being in violation in Order No. 1 JHT, 8/9/71, for having an opening in excess of 0.007 inches. Similarly, the necessity for lock washers, proper insulation, protection of cable and wiring from mechanical damage, are specifically provided for in Schedule 2G, *e.g.*; headlights are governed by 30 CFR 18.46, subsection (a) of which di-

⁷ 30 CFR 18.1.

⁸ 30 CFR 75.2(1).

rects that they be constructed as explosion-proof enclosures, and subsection (e) requires that the maximum deviation between lens and gasket contact surface be no greater than 0.002 inches.

[3] In view of the foregoing, we think Kaiser's contention that insufficient descriptions of conditions or practices alleged to constitute violations of mandatory health or safety standards were not provided is without merit. The violations as cited and described in writing were amplified by the testimony of the inspectors. One of the inspectors referred to Appendix II of Schedule 2G to illustrate his testimony.⁹ While it is true that specific requirements of Schedule 2G could have been more effectively made part of the record, we cannot disregard its provisions or ignore the occurrence of the conditions found and known to be permissibility violations. No showing has been made by Kaiser that Schedule 2G did not govern its equipment, or that other specifications were applicable. We conclude, therefore, that the conditions described in these Orders were violations of permissibility requirements as set forth in Schedule 2G, and that penalties must be assessed therefor.

In determining the amount of a civil penalty, section 109(a)(1) of the Act requires that six criteria be considered: (1) the history of previous violations; (2) the appropriateness of the penalty to the size of the operator's business; (3) the

negligence of the operator; (4) the effect of the penalty on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the operator's good faith in attempting to achieve rapid compliance.

As to criteria Nos. (1) (2) (4) and (6), above, we adopt herein the findings of the Administrative Law Judge. With exception of one violation, not here in issue, we find the operator demonstrated good faith in achieving compliance after notification of the alleged violations. Negligence and gravity will be considered hereinafter in connection with discussion of each of the individual violations.

Order No. 1 ACH, 6/7/71

(Loose studbolt on cover plate and loose headlight lens.) The inspector testified that these conditions could cause explosions if methane were to enter the control compartment or headlight enclosure (Tr. 218). Our review indicates that proper maintenance procedures would have disclosed the existence of these conditions. Therefore we find that these two violations posed potentially serious hazards and that the operator was negligent in allowing them to occur. A penalty of \$100 is assessed for each; the loose studbolt and loose headlight lens. (Total assessment for the two violations cited in this Order—\$200.)

Order No. 2 CR, 6/22/71

(Two instances of improperly installed conduit.) The inspector

⁹ Although Schedule 2G was used at the hearing it was not formally introduced into evidence.

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testified that the occurrence of these conditions, due to lack of maintenance, demonstrated negligence on the part of the operator (Tr. 265). He indicated that a possible result of such conditions might be that a flame from an electrical short (if one were to develop) might shoot out into the mine atmosphere and ignite coal dust (Tr. 267). It appears, however, from the entire testimony of the inspector that the chance of an ignition as a result of these conditions would be somewhat remote (Tr. 272-4). We conclude that these violations occurred as a result of the operator's negligent maintenance and were of a potentially serious nature. A penalty of \$75 is assessed for each instance of improperly installed conduit. (Total assessment for the two violations cited in this Order—\$150.)

Order No. 1 JHT, 8/9/71

(Two nonpermissible openings in step-flange joints, missing lock washer, improperly insulated cable reel.)

(a) As to the two nonpermissible openings in step-flange joints, the inspector testified that flames, caused by a possible electric short, could shoot out into the mine atmosphere and an explosion might result (Tr. 306, 311, 281). He felt that the operator was negligent in not being aware of these conditions, or in failing to use sufficient preventive maintenance (Tr. 282). Our review leads us to find that the nonpermissible openings were of a serious nature, that proper maintenance pro-

cedures would have revealed the existence of these conditions, and that the operator was negligent in allowing these violations to occur. A penalty of \$100 is assessed for each nonpermissible opening. (Total assessment for the two step-flange joint violations—\$200.)

(b) The inspector testified that the absence of a lock washer might allow the bolt to work loose faster, given the vibration of the machine, than if a lock washer were provided. He indicated, however, that the bolt was in place (Tr. 310). No precise testimony as to the existence of an electrical hazard was presented. We conclude that the operator was negligent in failing to have the lock washer installed, since he knew or should have known that it was required but that its absence, in this particular instance, was a nonserious violation. (A penalty of \$25 is assessed for this violation.)

(c) As to the cable reel, the inspector testified that a portion of the fiberglass insulation separating the reel from contact with the cable had broken away. He indicated that the hazard posed by this condition was the possible energization of the equipment and electrocution of the equipment operator. The possibility of energization, however, would appear to be somewhat remote since a portion of cable insulation would have to be missing and the uninsulated portion of cable would have to come into contact with the uninsulated part of the reel (Tr. 313, 322). The inspector also stated that the conditions occurred through

normal wear and tear (Tr. 313). In the absence of testimony on negligence we find that the operator was not negligent, and further find, because of the remoteness of hazard, that the violation was not serious. A penalty of \$20 is assessed. (Total assessment for this Order—\$245.)

Order No. 1 JHT, 7/27/71

(Cable guide sheave wheel not in operating condition.) The inspector testified that this wheel, over which the trailing cable travels, was caked with mud and would not turn (Tr. 286). He explained that the hazard created was that the cable more easily could be severed when subjected to stress (Tr. 287), and that an energized cable, if severed, could create electrical arcs and mine fires. He stated that the nonfunctioning sheave was easily observable and that the operator could have checked it prior to putting the equipment in motion (Tr. 288). We find that the hazard posed by this condition was serious, that the operator should have known of the condition and was therefore negligent in permitting it to exist. (A penalty of \$200 is assessed for this violation.)

IV.

*Order of Withdrawal No. 1 CR,
6/22/71*

This Order, issued pursuant to section 104(a) of the Act, described the following condition:

Dangerous quantities of float coal dust were permitted to accumulate on top of existing rock dust in the return air

course from 5 right section to the fan, a distance of about [4,200] feet.¹⁰

The condition was abated approximately 3½ hours after the Order was issued and the Order then terminated.

The inspector testified that the float coal dust extended 4,200 feet from five right section "all the way to the fan" (Tr. 233). He could not say how thick the dust was but indicated it was "absolutely black" for about 500 or 600 feet (Tr. 234).

Noting that 30 CFR 75.400 proscribes permitting accumulations of combustible materials in "active workings," the Judge found that a violation of this regulation was not proved because it had not been shown that the return air course was an "active working" within the definition of 30 CFR 75.2(g)(4). The definition states:

"Active workings" means any place in a coal mine where miners are normally required to work or travel.

It is MESA's position that the operator's employees were required to work and travel in the return air course and that the return air course is for that reason an "active working" subject to the requirements of 30 CFR 75.400.

[4] We held in *Mid-Continent Coal and Coke Company*, 1 IBMA 250, 79 I.D. 736 (1972), that an entry was an "active working" and therefore subject to the requirements of section 75.400. This holding was based on the finding that

¹⁰ The order erroneously stated the distance to be 42,000 feet.

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miners were regularly required to go into the entry for the purpose of inspecting a high voltage cable. The entry, in that case, was thus a place of normal work and travel for the operator's employees. In the instant case, the testimony of the inspector that the operator was required to inspect the air return twice a day (Tr. 238) is unrefuted. In addition, Mr. Starkovich, Kaiser's Mine Superintendent, testified, with reference to the cleanup program, that trickle dusters were kept in air returns and that these returns were rock-dusted twice a week. We deduce from this that employees were normally required to work and travel in the return air course. Consequently, we hold that the air return course in question was an "active working" subject to the requirements of 30 CFR 75.400.

Kaiser further contends, however, that a "dangerous accumulation" of float coal dust in the return air course was not proved in that no chemical analysis of the dust was made. In support of this contention Kaiser relies on a letter sent to the operator by a Bureau of Mines official in response to the operator's request for clarification as to what constituted a dangerous accumulation of float coal dust. The request was made in a letter, dated September 14, 1971, by the operator's superintendent of Raton Coal Mines, Mr. E. D. Moore.¹¹ The reply, dated November 15, 1971, by Mr. John W. Crawford, Acting Assistant Direc-

tor of Coal Mine Health and Safety¹² states in pertinent part:

A dangerous accumulation of float coal dust would be any accumulation of float dust in which the incombustible content was less than 80 percent. At present the only way to determine accurately the adequacy of the incombustible is by chemical analysis of the dust.

Kaiser contends that this is another reason why the Judge's decision vacating this citation should be affirmed.

[4] As to Kaiser's argument that a *dangerous accumulation* of float coal dust was not proved by MESA by chemical analysis, and its reliance on the aforementioned paragraph of Mr. Crawford's letter, we note first that Mr. Crawford's definition or interpretation was given to Kaiser more than two months after the citation in the withdrawal order here in question was issued. Therefore, Mr. Crawford's interpretation could not have been relied upon by the operator to his damage at the time the alleged violation occurred. Furthermore, we do not believe that the Crawford letter was intended to be taken as anything more than a definition of the word "dangerous" and thus is unrelated to the precise question and condition here involved, *i.e.*, the cited violation of 75.400 (section 304(a) of the Act). From our review of the record, we find that a violation of section 304(a) of the Act (30 CFR 75.400) did occur. This is in keeping with our holding in *Coal Processing Corporation*, 2 IBMA 336, 80 I.D. 748,

¹¹ Exhibit P-2.

¹² Exhibit P-4.

1973-1974 OSHD par. 16,978 (1973) that a visual observation will support a finding of a violation of the aforecited sections of the Act and Regulations. The instant case is unlike that presented to us in *Hall Coal Company, Inc.*, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), which involved a violation of section 304(d) of the Act, and wherein we held that a mere visual observation was not sufficient to support a finding of violation of that subsection without the taking of samples and analysis thereof. We conclude, therefore, that a violation of 30 CFR 75.400 did, in fact, occur in an active working and that a penalty should be assessed under section 109(a)(1) of the Act.

With respect to the criteria of negligence and gravity of the violation, we find that, since the operator was required to and did, in fact, inspect the area regularly, he should have known of the existence of the accumulations and thus was negligent in permitting the violation to occur. We find also that the violation did involve a serious element of gravity in that a possibility of ignition of the float coal dust in the air return was present (Tr. 238-239). A civil penalty of \$100 is assessed for this violation.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY

ORDERED that the decision with respect to:

1. Notice Nos. 1 CR, 2/28/71, 1 CR, 1/12/72, 1 CR, 1/13/72, and 4 WJB, 9/14/71 IS AFFIRMED;

2. Order Nos. 1 ACH, 6/7/71, 2 CR, 6/22/71, 1 JHT, 8/9/71, 1 JHT, 7/27/71, and 1 CR, 6/22/71 IS REVERSED, and the violations giving rise to these Orders ARE REINSTATED with associated penalties as follows:

1 ACH, June 7, 1971	\$200
2 CR, June 22, 1971	150
1 JHT, August 9, 1971	245
1 JHT, July 27, 1971	200
1 CR, June 22, 1971	100
Total	895

IT IS FURTHER ORDERED, that Kaiser Steel Corporation pay the penalties hereby finally assessed in the total amount of \$3,520 on or before thirty days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

APPEAL OF GENTZ CONSTRUCTION COMPANY

IBCA-1015-1-74

Decided December 26, 1974

Contract No. 14-06-200-7096A,
O'Neill Forebay Pumping Plant Water
System, Modification and Slope Protec-
tion, San Luis Unit, Central Valley
Project, California, Specifications No.
200C-855, Bureau of Reclamation.

December 26, 1974

Sustained.

1. Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: General Rules of Construction—Contracts: Construction and Operation: Duty to Inquire—Contracts: Construction and Operation: Drawings and Specifications

Where, in the course of installing and connecting new sand filter units with existing units under a contract to modify a water system, which provided that no separate payment would be made for pipe and fittings included with the filter units, but pipe and fittings required for connecting the units to existing piping would be paid for at unit prices, a contractor's claim for furnishing certain piping and fittings, which the Government had denied on the ground that its cost should have been included as part of the filter units, was upheld and the contractor was entitled to be paid therefor at unit prices since the material was installed beyond the limits of the new filter units and was thus connecting piping. The contractor's interpretation, which reconciled the specifications and drawings, was reasonable; since a latent ambiguity was present the contractor was not required to seek clarification of any and all doubts or possible differences in interpretation.

APPEARANCES: Mr. Gordon C. Schnell, Vice President, Gentz Construction Company, Fresno, California, for appellant; Mr. Ernest J. Skroch, Department Counsel, Sacramento, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE KIMBALL

INTERIOR BOARD OF CONTRACT APPEALS

This appeal arose under a contract awarded to the appellant to

modify the water system and to provide slope protection at the O'Neill Forebay Pumping Plant, of the San Luis Unit, Central Valley Project, in Merced County, California, for \$91,519.50.¹ It involves a claim amounting to \$8,262 for furnishing and installing, at a unit price of \$6 per pound, 1,377 pounds of 4" gate valves; 4" bronze tees; 4" bronze 90 degree ell; 4" bronze flanges; bolts; and 4" brass pipe, in the course of incorporating two new vertical pressure sand filter units (designated as Nos. 4 and 5) into a system with three existing units (called Nos. 1, 2 and 3).

The contracting officer ruled that the appellant was entitled to no additional compensation, on the ground that the work in question should have been included within the scope of furnishing, installing and testing the two new pressure sand filters under item No. 18 of the bidding schedule for the performance of which a lump-sum payment was provided. The appellant, however, contends that the claim is properly payable at the unit price of \$6 per pound called for under item No. 21, which is described in the bidding schedule as follows:

¹Based upon estimated quantities (Contract dated October 24, 1972 (Exh. 4)). Appellant's actual earnings under the contract were \$103,155.50, which included Order for Changes No. 1, dated June 26, 1973, in the amount of \$1,279. (Exhs. 3, 5). (Exhibits referred to are contained in the appeal file. Hereby incorporated into the appeal file as Exhibit 6 is appellant's letter dated November 6, 1974, itemizing the claim for 1,377 pounds. Transcript references relate to the page of the transcript of the hearing held in this appeal. Specifications hereinafter referred to are set forth in the Appendix.)

Furnish and install brass pipe with bronze fittings and brass or bronze valves, 2 and ½ inch to 4 inch inclusive, in nominal diameter, excluding 4-inch brass siphon pipe.

Following review of the appellant's pre-bid calculations after the dispute arose, the contracting officer acknowledged in his Findings of Fact and Decision that the costs associated with the work had been included in bid item No. 21.² The Government's point is that the contract required them to be covered in the lump-sum bid for item 18.

The Government's position is based upon subparagraph h. of par. 67 ("Pressure Sand Filters") of the specifications which provides:

Payment.—Payment for furnishing, installing, and testing two pressure sand filters will be made at the lump sum price bid therefor in the schedule, item 18 * * * and subparagraph a.(3) of par. 69 ("Metal Pipe, Fittings, and Valves"), which reads:

(3) Piping to be furnished and installed by the contractor for which separate bid items are not provided in the schedule is as follows:

(a) Piping and valves to be included with the new pressure sand filters.

In other words, the Government contemplated that certain piping and valves were to be installed or included with the filters as part of a lump-sum package.

The appellant asserts that the item 21 unit price is applicable be-

cause the piping in question was installed to connect existing piping to the two new filters.³ It relies on subparagraph a.(2)(b) of par. 69, which provides for unit prices for "[p]iping required for connecting two pressure sand filters to existing piping" and par. 71, entitled "Connecting Piping for Pressure Sand Filters." Par. 71 requires the contractor to

* * * furnish and install the necessary 4-inch and 1- and ½-inch brass pipe to connect * * * sand filter No. 3 and the two new pressure sand filters No. 4 and No. 5 into the existing system * * *

and goes on to provide as follows:

All five pressure sand filters shall be connected in parallel * * *. * * * it is anticipated that while the external piping of filter No. 3 is being moved and while filters No. 4 and No. 5 are being installed, it will be necessary to keep filters No. 1 and No. 2 in operation. * * * Payment for any or all equipment necessary to maintain flow in filters No. 1 and No. 2 shall be included in the price bid for the connecting piping for pressure sand filters.

Par. 71 concludes:

Payment for furnishing and installing the connecting piping for the pressure sand filters will be made at the unit price per pound bid in the schedule (items 20 and 21) * * *.

According to the appellant, all 1,377 lbs. of piping and related material on which this claim is based were installed in order to fulfill the requirements of par. 71.⁴

This dispute thus comes down to a disagreement over the amount or extent of the piping, fittings and valves which are included as part of

² Findings of Fact and Decision, dated November 15, 1973, par. 7 (Exh. 1). An essential to contractor success on a contract interpretation question is proof of his reliance on his interpretation at the time he entered into the contract. *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 6 (1963).

³ Tr. 7.

⁴ Appellant's Posthearing Reply Brief, 4.

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the new filters, to which the lump-sum payment provision is applicable. There is no difference, based upon physical characteristic or quality, between the item 18 filter piping and the item 21 connecting piping; the only distinction is that of manner of payment.⁵ The question is, where does the piping included with the filters begin and where does the connecting piping end?

In the appellant's view the material on which the claim is based cannot be considered part of the sand filter unit because it was installed between existing piping to the new filters and on again to existing piping. Such piping, it maintains, performs a connecting function, which use renders it piping payable under item 21 and not filter piping.

The piping and valves to be included with the filters are first dealt with in depth in par. 67 of the specifications. Under subparagraph a. the appellant was required to "furnish and install two vertical pressure sand filter units where shown on the drawings." Each unit was to "be complete from raw water inlet to filtered water outlet including steel filter tank, pipe, fittings, valves, pressure gages, rate-of-flow indicator, sand, and graded gravel for assembly ready for operation." The units were to "be connected in parallel with the existing units with provisions for individual operation to permit one unit to be removed from service for backwashing while

providing a continuous flow of filtered water from the remaining units."

Subparagraph c. (entitled "Materials") of par. 67 describes in detail what the Government considers are the components of the sand filter units, but does not state that they are includable with each sand filter unit. It is limited to how the filter tanks, inlet distributor and under-drain system are to be constructed, the type of pressure gages and rate-of-flow indicator to be provided, and the quality of sand and gravel to be furnished. With respect to piping and valves, subparagraph c. reads as follows:

(4) External piping and valves.—All piping, valves, and fittings shall conform to those shown on the drawings and as described in paragraph 69. * * *

The "drawings" mentioned without further identification in par. 67 refer to Drawing Nos. 805-208-1951 and 805-208-1952 which are entitled "Piping Arrangement." Only the former drawing is germane. It relates to the water filter room, where the sand filters are located. It shows the new filters, Nos. 4 and 5, and the existing filters, Nos. 1, 2 and 3, as well as the existing piping and new piping. New piping is depicted as running from existing piping to the new filters and past filter No. 3 to existing piping again. Absent from the drawing is any indication of how much of the new piping was considered filter piping to be paid for under bid item 18 and how much

⁵ *Id.*

was connecting piping covered by raw water inlet and the filtered water outlet.

Appearing on the drawing is a reference to "Detail N" which is shown elsewhere on the sheet and which the appellant relied on in determining "the division point" between the two bid items.⁶ Detail N shows a new pressure sand filter with the "filtered water outlet" referred to in par. 67, depicted as a flanged steel pipe nipple at the bottom of the filter tank. Since the "raw water inlet," also referred to in par. 67, is not labeled anywhere on the drawings, the appellant assumed it was a similar steel flanged nipple, otherwise unidentified, appearing at the top of the filter tank.⁸ Inasmuch as par. 67a. provides that "[e]ach unit shall be complete from raw water inlet to filtered water outlet" the appellant took the position that Detail N delineated the limits of the sand filter unit for the purposes of bid item 18.⁹ Accordingly, the appellant concluded that the pipe, fittings and valves to be included with the filter tank consisted of the pressure gages, the rate-of-flow indicator, the automatic air vent valve, the sampling cock and the pipe, fittings and valves required for the underdrain system.¹⁰ As shown on Detail N, all of these appear to be part of the sand filter unit between the limits of the

The Government, however, has sought to minimize the significance of Detail N. In his Findings of Fact and Decision the contracting officer described its purpose as "not to show limits of the pressure sand filters but to indicate a direction of flow through the filter which terminates at the bottom."¹¹ He also pointed out that under the contract, in case of discrepancy between drawings and specifications, the specifications govern, although the Government has now taken the position that no such conflict is present.¹²

Its major thrust is that the appellant's interpretation is erroneous because it ignores the provision of par. 67c.(4) dealing with external piping and valves. According to the contracting officer, the term "external piping" was purposely used to distinguish it from the underdrain piping which is provided for in par. 67c.(3). In the Government's view, there is a clear distinction between connecting piping and external piping. As we understand the Government's position, the piping between the steel filter tank and the filter valve and between the filter valve to the backwash line and from the backwash valve to the steel tank is considered to be external piping. Such external piping and related valves were therefore to be treated as part of the sand filter unit, pay-

⁶ Tr. 8-9.

⁷ Tr. 17.

⁸ Tr. 14, 17; Appellant's complaint, 3.

⁹ Appellant's letters dated June 8, 1973, and July 25, 1973, attached as Exhibits A and D, respectively, to the Findings of Fact and Decision (Exh. 1).

¹⁰ *Id.*

¹¹ Exh. 1, par. 6.

¹² Government's Posthearing Brief, 6.

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ment for which is covered by the lump-sum bid under item 18.¹³

[1] We have little doubt but that the Government intended to include what it called "external piping" as part of the sand filter unit for lump-sum bidding purposes. The legal effect of contract language, however, is not its actual intent but the meaning which would be conveyed to a competent and experienced bidder considering the specifications and drawings in an attempt to estimate his performance costs.¹⁴

There is, for this reason, a burden upon the Government in a contractual situation to use language which conveys its intent. If it does not, if a specification is reasonably susceptible to more than one interpretation which is consistent with the contract language and an objective determination of the parties' intention, it constitutes convincing proof that the specification is ambiguous.¹⁵

In this case the Government undertook to make a distinction between the pipe alluded to in par. 67a., which was to be covered in the lump-sum payment, and the connecting piping mentioned in par. 71. It sought to convey an essentially simple intention by means of an excessively complex set of provisions.

¹³ Exh. 1, par. 4; Tr. 26.

¹⁴ *Klefstad Engineering Company, Inc. & Blackhawk Heating & Plumbing Co., Inc.*, VACAB No. 661 (September 25, 1968), 68-2 BCA par. 7254, at 33,731, *aff'd on reconsideration*, 68-2 BCA par. 7396 (December 10, 1968).

¹⁵ *Bennett v. United States*, 178 Ct. Cl. 61, 64 (1967).

We find that in so doing an ambiguity was created.

As we have seen, what the Government considered to be the various components of a sand filter unit were set out in par. 67c. The provision was labeled "Materials," however, which is a broad term and does not connote the narrower meaning of "components." That a bidder might have been led astray by it is conceivable. In addition to describing the items previously mentioned in par. 67a. that are part of a "complete" filter unit, two new terms not listed there at all were introduced at this point: "(3) Underdrain system" and "(4) External piping and valves."

It is evident from the manner of their description in 67c. that the underdrain system, as well as the filter tank, pressure gages, rate-of-flow indicator, sand, and graded gravel were to be regarded as integral parts of the unit. What we must determine is the reasonableness of the appellant's position that the "pipe" mentioned in par. 67a. to which the lump-sum payment was also applicable was limited to that described as comprising the underdrain system.¹⁶ Even though ambiguous language has been drafted by the Government, it will not be interpreted against the Government unless the contractor's interpretation of it is reasonable, although in such a case the contractor need not

¹⁶ Exh. A of Exh. 1.

show that his interpretation is the only reasonable one.¹⁷

The peculiar wording of par. 67c.(4), the external piping provision, is quite unlike that found in the various other sections of par. 67c. which clearly describe specific components of each sand filter unit. It merely states that all piping, valves and fittings "shall conform to those shown on the drawings and as described in paragraph 69." Absent from par. 69 is any provision identifying or purporting to identify the piping and related materials which are to be regarded as part of the sand filter. The only relevant sections of par. 69 are subpar. a.(3)(a) which merely tells the contractor that the piping and valves to be included with the new filters are not to be paid for as separate items, and subpar. a.(2)(b) which tells him that the piping "required for connecting" the two new filters "to existing piping" is to be paid for at unit prices. There is no more elaboration of the term "external piping" in par. 69 than there is in par. 67.

From our vantage point, pars. 67 and 69 can reasonably be read together to mean that all external piping was not necessarily to be regarded as filter piping includable under the lump-sum bid item. Put another way, it appears to us that a reasonable interpretation of the specifications is that filter piping is lump-sum piping, connecting piping is unit price piping, and external

piping can be either. The Government's intention has been well-camouflaged. If it wanted all external piping to be only filter piping the Government could easily have so provided.

Consequently, the appellant concluded that "external piping" referred to the piping positioned external to the raw water inlet and filtered water outlet, and therefore external to the filter, and that there was no real distinction between external piping and connecting piping.¹⁸ This perhaps rather simplistic interpretation was not unwarranted under the circumstances.

Since the precise limits of the item 18 and item 21 piping were not to be found in the specifications, as the Government has acknowledged,¹⁹ the appellant recognized "that there was some problem in determining the division point between these two bid items."²⁰ The question arises, at this stage was the appellant under a duty to make inquiry, to seek clarification? We

¹⁸ Appellant's Posthearing Brief, 3, 4.

¹⁹ See Government's Answer, dated February 28, 1974, par. A.4., to appellant's Complaint, dated February 11, 1974, par. A.4. In par. 7 of his Findings of Fact and Decision, the contracting officer found with respect to "the pre-bid information furnished all bidders visiting the site of work * * * that they were verbally instructed as to the limits of the pipes, valves and fittings to be included with the pressure sand filter." Mr. Gordon C. Schnell, appellant's vice president, testified at the hearing that he "in company with other members of my firm visited the job site prior to bid and that no such instructions were issued to me or members of my firm * * *." (Tr. 11) The appellant's denial of the contracting officer's finding was unrefuted. Moreover, par. C.1. of the Government's Answer reads: " * * * No prebid instructions were given to anyone."

²⁰ Tr. 17.

¹⁷ *Bennett v. United States*, note 15, *supra*; *Randolph Engineering Co. v. United States*, 176 Ct. Cl. 872, 880 (1966).

think not, for the reasons that follow. Although a potential contractor is required to inquire about a major patent discrepancy or a drastic conflict in provisions, he need not seek clarification of any and all doubts, ambiguities or possible differences in interpretation.²¹ He is not responsible for ferreting out the Government's hidden intention in bid documents.²²

In this case the appellant looked for guidance to the drawings, as directed by the specifications, and specifically to Detail N. Since the limits of each filter unit, established in par. 67, run from raw water inlet to filtered water outlet, it interpreted narrowly the piping and related materials which were to be included as part of the sand filter unit for lump-sum payment purposes. We are unable to find any basis for the contracting officer's determination that Detail N was intended merely to indicate the direction of flow; no such restriction is indicated. On the contrary, inasmuch as the filtered water outlet is depicted only on Detail N, and is otherwise unmentioned except in passing, it is clear that the purpose of Detail N was to complement the specifications.²³ Whenever possible

specifications and drawings should be read in harmony so as to implement, and not conflict, with each other.²⁴

In our view, appellant's version of the contract provisions constituted a harmonious resolution of the question.²⁵ We find that the ambiguity in the language was not so obvious or uncertain as to impose upon the appellant an obligation to bring it to the Government's attention prior to bidding.²⁶ Since the appel-

been "specifically covered" in the specifications, Par. 69b. (12).

²⁴ *Unicon Management Corp. v. United States*, 179 Ct. Cl. 534 (1967).

²⁵ In this connection we note that early in the dispute, after appellant's claim letter of June 8, 1973, was received (Exh. A to Exh. 1), the Government's Project Construction Engineer found merit in the appellant's position. His memorandum dated June 26, 1973 (Exh. 6), to the Regional Director stated in part:

"Would you review the contractor's letter along with the original specifications and inform us as to how to answer the contractor. We generally agree with the contractor that the lines for payment are not clear and the logical interpretation would be as the contractor is interpreting them." (Italics supplied.)

²⁶ *L. Rosenman Corporation v. United States*, 182 Ct. Cl. 586, 590-92 (1968); *Klefsch Engineering*, note 14, *supra*. Even where a contractor has been charged with a duty to inquire, the Armed Services Board has held that he may still recover when by reason of his bid being less than half of the Government's estimate, the Government was put on notice that he may have made an error in preparation or that the specifications were subject to an interpretation different from what was intended, since "the duty to inquire is a two-way street" and the Government had "the last clear chance" to clarify the situation before making an award. *Larco Industrial Painting Corporation*, ASBCA No. 12872 (October 7, 1968), 68-2 BCA par. 7303, at 33,951. *Accord, Fairchild Industries, Inc.*, ASBCA Nos. 16302, 16413 (March 29, 1974), 74-1 BCA par. 10,567, at 50,084. In this connection we note in passing that the appellant's bid on item 18 was only \$12,073, or less than 2/5 of the Government's estimate of \$32,000, according to the abstract of bids (Appellant's Exhibit No. 1 (with forwarding letter dated October 18, 1972)).

²¹ *WPC Enterprises*, note 2, *supra*.

²² *Piracci Construction Company, Inc.*, GSBCA No. 3715 (June 17, 1974), 74-2 BCA par. 10,719 at 50,985. As the Court of Claims has said, "A government contractor cannot properly be required to exercise clairvoyance in determining its contractual responsibilities." *Corbetta Constr. Co. v. United States*, 198 Ct. Cl. 712, 723 (1972).

²³ It is clearly contemplated by the specifications that materials may be "shown or called for on the drawings" which have not

lant's interpretation of the contract requirements was reasonable, it is controlling.

On the evidence before us, we are satisfied that the appellant did not include the cost of the material in question in any pay item other than item 21. We find that it has not been paid therefor, although the work was done. For these reasons we sustain the appeal and hold that the appellant is entitled to additional compensation, pursuant to bid item 21, in the amount of \$8,262.²⁷

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPENDIX

WATER PIPE AND EQUIPMENT

67. Pressure Sand Filters

a. General.—The contractor shall furnish and install two vertical pressure sand filter units where shown on the drawings. Each unit shall be complete from raw water inlet to filtered water outlet including steel filter tank, pipe, fittings, valves, pressure gages, rate-of-flow indicator, sand, and graded gravel for assembly ready for operation. The units shall be comparable to the existing units which are Calfilco, type VN. The units shall be connected in parallel with the existing units with provisions for individual operation to permit one unit to be removed from service for backwashing while pro-

viding a continuous flow of filtered water from the remaining units.

b. Type and rating.—Each filter unit shall be of the vertical tank, rapid sand, pressure-type * * *. Each filter furnished shall have a capacity of * * *.

c. Materials.—

(1) Filter tanks.—Each filter tank shall be fabricated in sections small enough to permit moving the individual sections through the existing hatches and doorways with final assembly taking place at the locations of the tanks shown on the drawings. It is anticipated that each filter tank will have to be fabricated in three or four sections. The tanks shall be provided with ellipsoidal convex heads. The tanks shall be of welded steel construction. All piping connections and manhole openings in the tanks shall be suitably reinforced. One manhole, not smaller than 11 inches by 15 inches, shall be provided in each top head. One rectangular manhole, 18 inches by 14 inches, in accordance with drawing No. 805-208-1994, shall be provided in each side shell located as shown on the drawings and with the bottom lip of the manhole flush with the concrete filter bed base. One handhole, 4 inches by 6 inches, shall be provided in each side shell. Suitable legs or adjustable jack legs shall be provided to allow at least 5 inches clearance between the bottom of the filter and the floor. Concrete bases shall be provided under the filter tanks, similar to the concrete bases under the existing tanks.

(2) Inlet distributor. The inlet water distributor in each filter unit shall be constructed in a manner that will cause the inlet water to evenly distribute itself across the total area of the filtering area, either by striking a baffle plate or by other suitable means.

(3) Underdrain system.—Each filter unit shall be provided with an adequate underdrain system designed to discharge the backwash water laterally and uniformly to prevent jet action and also to collect the filtered water. The system shall be of the header, lateral, distribution-type, or other acceptable alternate. The header

²⁷ See *Timmons, Butt and Head, Inc.*, ASBCA No. 17584 (August 27, 1973), 73-2 BCA par. 10,236.

lant's interpretation of the contract requirements was reasonable, it is controlling.

On the evidence before us, we are satisfied that the appellant did not include the cost of the material in question in any pay item other than item 21. We find that it has not been paid therefor, although the work was done. For these reasons we sustain the appeal and hold that the appellant is entitled to additional compensation, pursuant to bid item 21, in the amount of \$8,262.²⁷

SHERMAN P. KIMBALL,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPENDIX

WATER PIPE AND EQUIPMENT

67. Pressure Sand Filters

a. General.—The contractor shall furnish and install two vertical pressure sand filter units where shown on the drawings. Each unit shall be complete from raw water inlet to filtered water outlet including steel filter tank, pipe, fittings, valves, pressure gages, rate-of-flow indicator, sand, and graded gravel for assembly ready for operation. The units shall be comparable to the existing units which are Calfilco, type VN. The units shall be connected in parallel with the existing units with provisions for individual operation to permit one unit to be removed from service for backwashing while pro-

viding a continuous flow of filtered water from the remaining units.

b. Type and rating.—Each filter unit shall be of the vertical tank, rapid sand, pressure-type * * *. Each filter furnished shall have a capacity of * * *.

c. Materials.—

(1) Filter tanks.—Each filter tank shall be fabricated in sections small enough to permit moving the individual sections through the existing hatches and doorways with final assembly taking place at the locations of the tanks shown on the drawings. It is anticipated that each filter tank will have to be fabricated in three or four sections. The tanks shall be provided with ellipsoidal convex heads. The tanks shall be of welded steel construction. All piping connections and manhole openings in the tanks shall be suitably reinforced. One manhole, not smaller than 11 inches by 15 inches, shall be provided in each top head. One rectangular manhole, 18 inches by 14 inches, in accordance with drawing No. 805-208-1994, shall be provided in each side shell located as shown on the drawings and with the bottom lip of the manhole flush with the concrete filter bed base. One handhole, 4 inches by 6 inches, shall be provided in each side shell. Suitable legs or adjustable jack legs shall be provided to allow at least 5 inches clearance between the bottom of the filter and the floor. Concrete bases shall be provided under the filter tanks, similar to the concrete bases under the existing tanks.

(2) Inlet distributor. The inlet water distributor in each filter unit shall be constructed in a manner that will cause the inlet water to evenly distribute itself across the total area of the filtering area, either by striking a baffle plate or by other suitable means.

(3) Underdrain system.—Each filter unit shall be provided with an adequate underdrain system designed to discharge the backwash water laterally and uniformly to prevent jet action and also to collect the filtered water. The system shall be of the header, lateral, distribution-type, or other acceptable alternate. The header

²⁷ See *Timmons, Butt and Head, Inc.*, ASBCA No. 17584 (August 27, 1973), 73-2 BCA par. 10,236.

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and lateral pipes located inside the pressure sand filter which make up the underdrain system shall be schedule 80 PVC (polyvinyl chloride).

(4) External piping and valves.—All piping, valves, and fittings shall conform to those shown on the drawings and as described in paragraph 69. The control valves shall control the filter unit operations of "wash," "rewash," "filter," and "off." Each filter unit shall be provided with an automatic air vent valve and also a sampling cock in the filtered water outlet.

(5) Pressure gages.—Each filter unit shall be provided with a duplex pressure gage for indicating the raw water inlet pressure and the filtered water outlet pressure, so as to indicate the loss of head through the filter.

(6) Rate-of-flow indicator.—Each filter unit shall be provided with a rate-of-flow indicator, calibrated in gallons per minute to visibly show the rate of filter or backwash of each unit. The indicator shall preferably be of the orifice type, with an accuracy of within 4 percent.

(7) Sand.—Each filter unit shall be furnished complete with sand having a uniformity coefficient of not over 1.5 and an effective size of 0.40 to 0.50 millimeters for a total depth of sand charge of not less than 24 inches.

(8) Gravel.—Each filter unit shall be furnished complete with four layers of graded gravel above the underdrain system, the gravel varying in size from $\frac{3}{4}$ inch to No. 10 mesh for a total depth of gravel charge of not less than 12 inches.

d. Drawings and data to be furnished by the contractor.—

(1) General.—At the earliest possible date after award of contract and before manufacture is begun, or shipment of the equipment is furnished from stock, the contractor shall submit to the Government for approval, three sets of certified prints of outline dimensional drawings, and layout of the installation, and catalog data or other pertinent information to demonstrate fully that the equipment to

be furnished will conform to the requirements and intent of these specifications. The contractor shall also submit information required under "Data to be Furnished by Contractor" as listed in the following tabulation:

Data to be Furnished by Contractor
(Pressure Sand Filters)

Manufacturer	_____
Filter flow rate per unit (g.p.m.)	_____
Backwash flow rate per unit (g.p.m.)	_____
Diameter of filter tanks (inches)	_____
Overall height of unit (inches)	_____
Design working pressure (p.s.i.)	_____
Size unit pipe connections (inches)	_____
Weight of gravel charge each unit (pounds)	_____
Weight of sand charge each unit (pounds)	_____
Weight of each unit (operating) (pounds)	_____
Manufacturer and type pressure gage	_____
Manufacturer and type rate-of-flow indicator	_____

* * * The Government shall have the right to require the contractor to make any changes in the equipment design which may be necessary, in the opinion of the Government, to make the equipment conform to the requirements of these specifications, without additional cost to the Government. Approval by the Government of the contractor's drawings shall not be held to relieve the contractor of any part of the contractor's responsibility to meet all of the requirements of these specifications or of the responsibility for the correctness of the contractor's drawings.

(2) Final drawings.—When the equipment is ready for shipment, the contractor shall furnish three complete sets of reproduces and five sets of prints of the final correct assembly drawings, and of such construction drawings as, in the opinion of the Government, may be re-

quired for erection, maintenance, and repair. The contractor shall also furnish five copies of sufficient information to facilitate the identification of parts, and shall furnish five sets of complete detailed instructions for the installation, operation, maintenance, and repair of the equipment.

The drawings shall show all changes and revisions, with revision dates, made up to the time the equipment is completed and ready for shipment.

(4) Costs.—The cost of preparing drawings and submitting drawings and data to the Government shall be included in the price bid in the schedule for the pressure sand filters.

f. Installation.—The pressure sand filters shall be installed in accordance with the manufacturer's installation instructions and as shown on the drawings. After the equipment has been installed, it shall be serviced and tested as provided in subparagraph 69.d. and subparagraph 67.g. below.

g. Testing.—The pressure sand filters shall be tested by the contractor to determine that they operate properly at the rated flow. The test shall include the operation of the valves, on each unit, through the stages of backwash, rewash, and filtration and observing the operation to see that the filter unit is properly performing the desired function at each stage.

h. Payment.—Payment for furnishing, installing, and testing two pressure sand filters will be made at the lump-sum price bid therefor in the schedule, item 18.

69. Metal Pipe, Fittings, and Valves

a. General.—

(1) Drawings.—the drawings in these specifications show in full lines the pipe fittings and valves which are to be furnished and installed under these specifications. Existing pipe, fittings, and valves are shown in dotted lines. All of the existing pipes and equipment in the pump-

ing plant are not shown, but the drawings are in sufficient detail to show approximate locations of piping to which connections are to be made and the location of piping lying in close proximity to piping that is to be installed. The Government will not prepare bills of material or further detail drawings for fabricating the piping. The contractor shall prepare such detail drawings and bills of material as he deems necessary for fabrication and installation purposes, and the cost of such drawings and bills of materials shall be included in the price bid in the schedule for furnishing and installing the various kinds and sizes of piping.

(2) Piping to be furnished and installed by the contractor.—The items in the schedule for furnishing and installing the various sizes and kinds of metal pipe, fittings, and valves shall include the furnishing and installing of all pipe, fittings, valves, accessories, and joint material as shown on the drawings or required for the complete installation, including the following:

- (a) 4-inch brass siphon pipe.
- (b) Piping required for connecting two pressure sand filters to existing piping.
- (c) Piping required for the rotation of the external valves and pipe for existing pressure sand filter No. 3.
- (d) Piping required for relocation of a 3-inch fire protection line.
- (e) 1- and ½-inch siphon filling line.

(3) Piping to be furnished and installed by the contractor for which separate bid items are not* provided in the schedule is as follows:

- (a) Piping and valves to be included with the new pressure sand filters.
 - (b) Piping and valves to be included with the vacuum pump station.
- b. Materials.—Materials for the piping system shall conform to the following requirements:

*Inserted pursuant to I.J. of Supplemental Notice No. 1, dated September 28, 1972. Other changes made in the specifications pursuant to the Notice have been incorporated without further identification.

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(1) Pipe.—All pipe, unless otherwise indicated, shall be red brass, seamless, I.P.S. class 1, regular (standard weight). Federal Specification WW-P-351.

(2) Flanges.—Pipe flanges shall be bronze, 150-pound, plain faced, screwed, silver brazed (Federal Specification WW-F-406), or welded.

Contact faces of pipe flanges shall be in accordance with Manufacturers Standard Society of the Valves and Fitting Industry, Standard Practice SP-6. Screwed joints for brass flanges may be sweated after assembly if necessary, to stop leaks.

(3) Fittings.—Pipe fittings, 2 inches and under, shall be bronze, 125-pound, screwed, Federal Specification WW-P-460, class A or silver brazed fittings.

Pipe fittings, 2 and $\frac{1}{2}$ inch to 6 inch, shall be bronze, 150-pound, flanged fittings, ASA B 16.24 for silver brazing, or forged fittings for welding.

(4) Gaskets.—Gaskets shall be cloth inserted rubber, $\frac{1}{16}$ -inch thick, ring gaskets for joints with raised faces, full face gaskets for others.

(5) Joint compound.—Joint compound shall be graphite and boiled linseed oil.

(6) Bolting.—Bolts shall be carbon steel machine bolts with cold punched semifinished, hex nuts, ASTM: A 307, grade B.

(7) Unions and joints.—Unions, 2 inch and under, shall be 250-pound brass or bronze, composition B, Federal Specification WW-U-516.

Joints, 2 and $\frac{1}{2}$ inch and larger, shall be flanged, silver brazed or welded.

(8) Valves.—Valves, 2 inch and smaller shall be bronze, 150-pound screwed. Valves 2 and $\frac{1}{2}$ inch and larger shall be bronze, 150-pound flanged, OS&Y.

Gate valves shall be single-wedge disc, bronze trim, removable seat and disc, rising stem, Federal Specification WW-V-54, type II, class B (screwed) or outside screw and yoke (flanged).

Globe valves shall be screwed plug-type with removable seat and disc. * * *

The check valve at the vacuum pump

installation shall be the screwed, vertical lift check-type * * *.

The solenoid valve for the vacuum pump seal water supply line shall be $\frac{1}{2}$ inch, screwed, bronze body, single-seat globe-type with renewable disc for cold water service, 100 pounds per square inch pressure. The valve shall be of the normally closed construction with coil suitable for continuous operation on 208-volt, 60-hertz, alternating current circuit. * * *

The needle valves shall be screwed, brass, or bronze, globe-type, for cold water service, 100 pounds per square inch pressure, suitable for repacking under pressure. * * *

(9) Welding or backing rings.—Welding or backing rings used in field welding joints in brass pipe shall be brass.

(10) Pipe outlets.—Pipe outlets used in making branch connections to existing brass pipe shall be * * *.

(11) Insulating compression-type couplings.—Each half of the insulating compression-type coupling shall have a pipe end insulator and an insulating gasket. Any pipe stops shall be removed from the middle ring. * * *

(12) Miscellaneous material.—Where materials are shown or called for on the drawings, but not specifically covered in these specifications, the contractor shall furnish standard commercial grades and products.

(13) Insulated pipe joints.—Insulated pipe joints, other than compression-type couplings, shall be equal to * * *.

c. Fabrication and installation of piping.—

(1) General.—The contractor shall fabricate and install all piping in a workmanlike manner and in accordance with the construction drawings, or as directed by the contracting officer, and the applicable requirements of the American Standard Code for Pressure Piping (ASA B31.1). Piping to be embedded in concrete shall be held firmly in position and protected from damage and displacement while the concrete is being placed and until it has set thoroughly. No wood sup-

ports shall be embedded in concrete. The interior of all pipe, fittings, and valves shall be clean and free from blisters, loose mill scale, excessive rust, grease, sand, dirt, and other foreign matter when installed. Care shall be taken to prevent the entrance of foreign matter into the piping during the progress of the work. Where necessary, open ends of pipe, fittings, and valves shall be plugged or closed in a suitable manner to prevent clogging during construction. If any portion of the piping should become either partially or wholly clogged before final acceptance of the work, it shall be thoroughly cleaned or shall be replaced. Open ends of piping to which future piping will be connected shall be closed by pipe plugs, blind flanges, or wooden flange protectors. Embedded pipe and fittings shall not be painted but shall be thoroughly cleaned as stated above.

In general, flanges or unions are shown on the piping drawings only where they are required for connection to equipment, valves, headers, or where necessary for removal of a pipe. The contractor may add any flanges or unions necessary to suit his method of fabrication or installation, subject to the approval of the contracting officer. Short pieces of pipe spliced or put together with fittings where long lengths can be used will not be permitted.

Where pipe is installed across expansion joints of the structure provision shall be made for expansion and changes in alignment in accordance with the details shown on the drawings.

After installation, all piping systems shall be tested as specified in subparagraph 69.7. After satisfactory completion of the cleaning and testing, all exposed piping and metal tubing, valves, and fittings shall be painted as provided in paragraph 82.

(2) Piping with screwed joints.—All pipe, after being cut and before being threaded, shall be reamed and all burrs shall be removed. Threads shall be cut

to the proper pitch, size, and thread form by suitable dies, and shall be free from torn or ragged surfaces. Threads shall conform to the American Standard for Taper Pipe Threads (ASA B2.1). Not more than three threads on the pipe at any joint shall remain exposed after installation. Screwed joints shall be made up with joint compound composed of graphite and boiled linseed oil applied to the male threads only. Screwed joints shall be metal to metal. Calking of screwed joints to stop or prevent leakage will not be permitted.

(3) Piping with flanged joints.—Any rust preventive compound that was applied to the faces of flanges before shipment shall be removed before the flanges are installed. Acid or tools that would mar the finished surfaces of the flanges will not be permitted. Flanged joints shall be made up with undamaged gaskets properly centered in the joints. The thread of bolts, studs, and nuts shall be lubricated with graphite and oil thread compound so that the nuts can be run up by hand. Care shall be taken that excessive tension is not applied to bolts or studs, and that the tension is applied as nearly uniformly as possible.

(4) Piping with silver brazed, soldered, and flared-tube joints.—The preparation of pipe tubing and fittings and the method of making up the joints shall conform to the recommended procedure of the manufacturer of the fittings.

(5) Piping with welded joints.—All details concerning the welding of pipe joints, including the qualification of welding procedures, welders, and welding operators shall conform to the requirements of section 6, chapter 4 of the code specified in subparagraph (1) above. Backing rings shall be used on welded pipe joints in which the interior will not be accessible for cleaning after the welding has been completed. Welding of brass pipe and fittings shall be done by the oxyacetylene process.

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(6) Branch outlets.—Brazing-type outlets shall be used for branch connections to existing piping.

d. Testing and disinfecting water piping and filter tanks.—After the piping has been installed, the joints completed, and the valves installed, the contractor shall test the pipe and filter tanks for leakage by filling the pipe and filter tanks with water and subjecting them to a hydrostatic pressure of 150 pounds per square inch for a period of not less than 30 minutes, during which time the pipe and joints shall be thoroughly inspected for leakage and other defects. If any part of the pipe or any valve, joint, or fitting shows any leakage, it shall be made watertight. The contractor shall furnish all pumping apparatus, labor, tools, pressure gages, and other equipment required for making the tests, and the cost thereof shall be included in the price bid in the schedule for the piping or equipment being tested. * * *

e. Measurement and payment.—Measurement for payment for all metal pipe, fittings, valves, and accessories will be based on weight, lineal footage, or lump-sum listed in the schedule regardless of the material specified, and will be made only on the quantity of such metal pipe, fittings, valves, and accessories furnished and installed in accordance with the drawings or as directed. Payment for furnishing and installing metal pipe, fittings, and valves of various sizes or kinds will be made at the applicable prices bid therefor in the schedule, except that the 4-inch gate valve in the siphon line will be paid for in item 15.

* * * * *

71. Connecting Piping for Pressure Sand Filters

The contractor shall furnish and install the necessary 4-inch and 1- and ½-inch brass pipe to connect the modified pressure sand filter No. 3 and the two new pressure sand filters No. 4 and No. 5

into the existing system. The installation of the piping shall be as shown on the drawings or as directed by the contracting officer. All five pressure sand filters shall be connected in parallel with provisions to allow one or more units to be removed from service for backwashing while providing a continuous flow of filtered water from the remaining units.

The maximum water supply shutdown time, in accordance with paragraph 77, shall be no longer than 4 hours or as extended by the contracting officer. It is anticipated that while the external piping of filter No. 3 is being moved and while filters No. 4 and No. 5 are being installed, it will be necessary to keep filters No. 1 and No. 2 in operation. This can be accomplished by placing blind flanges in the existing 4-inch brass pipe and by capping the existing 1- and ½-inch brass pipe at such points as directed by the contracting officer. All temporary pipe hangers or supports, blind flanges, pipe caps or plugs needed to maintain flow through pressure sand filters No. 1 and No. 2 while the installations are being made shall be furnished by the contractor and shall remain the property of the contractor and shall be removed from Government property at the completion of the work. Payment for any or all equipment necessary to maintain flow in filters No. 1 and No. 2 shall be included in the price bid for the connecting piping for pressure sand filters.

Fabrication and installation of the piping shall be in accordance with subparagraph 69.c. All painting shall be done in accordance with provisions of paragraph 82. Pipe supports and hangers shall be in accordance with provisions of paragraph 76.

Payment for furnishing and installing the connecting piping for the pressure sand filters will be made at the unit price per pound bid in the schedule (items 20 and 21), which price shall include painting, testing, and disinfecting.

* * * * *

**NORTH AMERICAN COAL
CORPORATION**

3 IBMA 515

Decided *December 30, 1974*

Appeal by North American Coal Corporation from a decision upon remand by an Administrative Law Judge in Docket Nos. DENV 73-3-P, 73-32-P, 73-39-P and 73-40-P assessing civil penalties in the amount of \$7,650 pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Modified.

1. Federal Coal Mine Health and Safety Act of 1969: Findings

Where an Administrative Law Judge fails to support his ultimate findings and conclusions with basic findings which reflect the preponderant weight of the evidence in assessing a penalty pursuant to section 109, the Board will make the necessary findings.

2. Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

Where an Administrative Law Judge unreasonably fails to take into account losses resulting from a vacated withdrawal order in assessing a penalty for the violation cited in such order, the Board will do so.

APPEARANCES: John A. MacLeod, Esq., and Timothy M. Biddle, Esq., for appellant, North American Coal Corp.; William H. Woodland, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

*OPINION BY
ADMINISTRATIVE JUDGE
DOANE*

*INTERIOR BOARD OF MINE
OPERATIONS APPEALS*

I.

Procedural Background

On April 17, 1974, the Board handed down its decision with respect to an appeal by North American Coal Corporation (North American), docketed as IBMA 73-42, 3 IBMA 93, 81 I.D. 204, 1974-1975 OSHD par. 17,658 (1974), which dealt with an opinion and order of an Administrative Law Judge finding violations and assessing civil penalties pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969. 83 Stat. 756, 30 U.S.C. § 819 (1970). Our decision was wholly dispositive with respect to some of the issues presented on appeal. However, with regard to some of the assessments challenged, we remanded the case to the Judge so that he could make explicit his basic findings and supporting rationale for his ultimate findings and conclusions. Finally, we held that a Judge may, in accordance with certain guidelines, consider economic losses suffered by an operator as a result of a vacated withdrawal order as a mitigating factor in assessing civil penalties for violations cited in such order. Pursuant to that conclusion, we re-

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manded two assessments for re-determination.

The Judge issued a decision responsive to our remand on June 11, 1974. North American appeals therefrom, contending that some of the ultimate findings of gravity and negligence are unsupported by adequate basic findings or are contrary to the evidentiary record. North American also maintains that the Judge abused his discretion in refusing to take into account the economic losses sustained as a result of a vacated withdrawal order involved in the instant case. North American asks that we exercise our *de novo* review power to modify certain of the findings and assessments made by the Judge on remand. 43 CFR 4.605.

II.

Issues on Appeal

A. Whether the Administrative Law Judge made ultimate findings of gravity and negligence in assessing penalties which are supported by adequate basic findings clearly reflecting the preponderant weight of the evidence.

B. Whether the Administrative Law Judge abused his discretion by refusing to take into account the economic losses resulting from a vacated withdrawal order in assessing a civil penalty for a violation cited therein pursuant to section 109 of the Act.

III.

Discussion

A.

Challenges to Mandatory Assessment Criteria Findings

[1] Upon a finding of violation, a Judge is obliged to assess a civil penalty pursuant to section 109. Under subsection (a) of section 109, he is required to make findings with regard to negligence and gravity. With regard to the criterion of negligence, we held in *Robert G. Lawson Coal Co.*, 1 IBMA 115, 119, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972), the following:

* * * Negligence involves the failure to do what a reasonable man would do under the same or similar circumstances to prevent a violation of the Act. Negligence must be determined on the basis of circumstances leading to the existence or occurrence of the violation. * * *

In that same case, 1 IBMA at 120 we stated the tests of gravity as follows:

* * * Each violation should be *analyzed* in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring. The potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the particular mine at the time the violation is detected. * * * (Italics added.)

In remanding the assessments now before us for redetermination, we specifically indicated that these were the respective tests to be applied. *North American Coal Corp.*,

(*supra*) 3 IBMA at 114-115. In considering North American's renewed appellate challenge to some of the assessments made pursuant to our remand, the above-quoted tests of negligence and gravity drawn from the *Lawson* case provide the yardsticks against which the Judge's findings are to be measured.

We come then to the specific arguments made by North American in this appeal. For convenience, we deal with the citations of violations by the substantive section of the Act or regulation alleged to have been violated.

1. Section 302(a) Charges

In *Order of Withdrawal 1 WB*, dated April 3, 1970, North American was charged with a violation of section 302(a), the roof control provision of the Act. 83 Stat. 767, 30 U.S.C. § 862(a) (1970), 30 CFR 75.200. More specifically, the condition cited by the inspector and found by the Judge to be a violation was the failure to employ temporary roof supports of adequate diameter with cap pieces on five-foot centers. The Judge concluded with respect to gravity that the conditions cited were serious because they constituted a potential danger to the safety of miners in the form of a roof fall and possible injury or death. *Dec.* 2-3. He also held that North American was negligent because the condition cited was readily observable. North American challenges these conclusions on the theory that the record compels contrary findings.

The evidence of record reveals that North American did have tem-

porary roof supports four inches in diameter, but that the inspector was of the opinion¹ that an inch in diameter for every 15 inches in the height of the coal bed was the minimum standard that ought to have been followed. (Tr. 96-7.)² When asked if he had observed any fractures or conditions that would indicate that the roof might fall, the inspector answered "No. The roof appeared to be rather substantial." (Tr. 78.) The inspector also stated that the areas he found to be lacking in adequate temporary roof support each involved approximately 22 or 23 feet immediately outby a working face where a continuous miner had just completed

¹ North American persistently calls attention to the "opinion" nature of the inspector's testimony. In our view, an Administrative Law Judge has discretion to attach great weight to an opinion expressed by a federal coal mine inspector, if it is credible and relevant, because he testifies as an expert. Of course, even though a witness may be qualified as an expert, cross-examination or other evidence may reveal that his opinion is entitled to little weight, if any at all. With regard to the case at hand, the opinion evidence from the inspector relevant to a determination of seriousness is favorable to North American (Tr. 78). The attack on some of the inspector's opinions in North American's brief appears to us to have been a mistaken effort to continue the argument over whether there was a violation, an issue not before the Board on this appeal. *Br. of North American*, pp. 5-9.

² Although the regulation governing provisions of a roof control plan concerning temporary roof support provide for support with a minimum diameter of four inches, some roofs may require supports with larger diameters. 30 CFR 75.200-8. There is nothing in this record to show that North American was cited for a condition sanctioned by a roof control plan approved by MESA's predecessor, the Bureau of Mines. Moreover, even if the record revealed such circumstances, they would not constitute an absolute defense to a charge of failing to maintain a sound roof. *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1971-1973 OSHD par. 16,608 (1973).

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its run. (Tr. 72-73.) He admitted that the continuous miner that he saw could mine for 23 or 24 feet without exposing its operator to the temporarily supported roof. (Tr. 95-6.) He also conceded that he did not see anyone under the inadequately supported roof. (Tr. 96.)³

Apart from the statements of the inspector, there is also the testimony of North American's witness, Mr. Elmer Johnson, a professional mining engineer with considerable experience in coal mines in general and with the subject Kenilworth mine in particular. When queried about the roof condition of the subject mine he replied: "I worked in about nine different mines in the West, Midwest and East, and I've been in dozens of other mines; and the top of the Kenilworth Mine is probably the best top that I've ever been exposed to." (Tr. 129.) He also stated that the most recent roof fall fatality had taken place in 1955 and that in the 10 to 15 years prior to this case, only one serious lost-time accident had occurred as the result of a roof fall at the Kenilworth Mine. (Tr. 173.)

On the basis of the foregoing evidence, we find that the likelihood or probability of a roof fall was remote and we hold that the violation was not serious. Furthermore, taking into consideration the fact that the inspector never fully explained the basis for his opinion

with respect to proper diameter for roof supports and in light of the above-cited evidence, we find that North American did what could reasonably be expected in the circumstances to provide adequate temporary roof support and we therefore hold that the violation was not the result of negligence. In accordance with these findings and conclusions, we are reducing the penalty assessed from \$400 to \$100.

The assessment made with respect to the roof control violation cited in *Notice 1 FWT*, dated January 19, 1972, is also attacked on this appeal. In particular, North American contends that the Judge misapplied both the gravity and negligence criteria.

The evidence of record reveals that the notice was issued when the inspector observed a readily apparent loose roof that was not adequately supported. Testimony at the hearing revealed that the loose roof was 10 to 12 inches thick and 20 feet in length and that it extended the width of the entry. Dec. 8.

The Judge concluded that the violation was serious because of the potential for roof fall but, as before, he failed to evaluate the probability of such a fall occurring. In our judgment, the ready observability of the loose roof, in the absence of expert evidence to the contrary, suggests that the forces tending toward roof collapse were well advanced. In addition, although we recognize that miners could have avoided the bad roof by filing down

³ In *Valley Camp Coal Co.*, 1 IBMA 243, 248, 79 I.D. 731, 1971-1973 OSHD par. 15,390 (1972), we ruled that where miners are not exposed to a hazard, that fact tends to show that a violation is not serious.

the right hand side under a supported portion of the roof, we find this consideration unpersuasive since there were no warning signs posted and there was little likelihood that all the miners would take such protective action on their own. While it is true that the inspector did not observe any men working in the vicinity of the suspect roof (Tr. 576-8), the potential for a roof fall at a time when men would pass under was, so far as we can determine, a genuine proximate probability rather than a remote, speculative possibility. We therefore uphold as modified herein the Judge's conclusion that the instant violation was serious.

With respect to the ultimate finding of negligence, the Judge based his view on the ready observability of the loose roof. Since we agree that a reasonable man would have detected and remedied the condition, we uphold that finding of negligence.

The assessment of \$800 for the subject notice of violation will be affirmed.

2. Section 304(a) Charges

In *Orders 1 WB*, dated September 22, 1970, and *1 WB*, dated November 10, 1970, North American was charged with violations of section 304(a) of the Act which prescribes and requires cleanup of "accumulations" of *combustible* materials. 83 Stat. 774, 30 U.S.C. § 864 (a), 30 CFR 75.400. The September 22 order was issued because of alleged accumulations of coal and coal dust in shuttle car roadways vary-

ing from 4 to 12 inches in depth and spanning an area of 1,500 feet. The November 10 order cited North American because " * * * coal dust and loose coal were accumulated along No. 3 entry and a crosscut off No. 3 entry in No. 5 dip section for a distance of approximately 200 feet. Float coal dust was accumulated in eight crosscuts below the test conveyor along the main east entries." The Judge concluded that the former violation was serious because of a potential fire hazard. Likewise, he held the latter to be serious, and rationalized his conclusion on the theory that the accumulation was conducive to the propagation of an explosion. In substance, North American contends and we agree that the Judge's findings with respect to the gravity of the subject violations are defective because they lack a determination of the probability that a fire or an explosion might have taken place in the circumstances. *Robert G. Lawson Coal Co., supra*.

The inspector admitted on cross-examination that the dip sections where the subject violations took place were wet in parts, but he did not make a moisture content test nor did he amplify his observation. (Tr. 209.) The inspector also stated that moisture is a factor to be considered in determining incombustible content. (Tr. 238.) *Cf.* 30 CFR 75.402, 75.402-1.

North American's Mr. Johnson, whose qualifications were discussed earlier, testified that the subject dip sections were always wet. (Tr. 219,

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240.) It is true, as MESA points out, that Mr. Johnson was not present on the dates when the instant citations of violation were issued, but we find his testimony persuasive nevertheless because he testified as to the condition which *always* existed and the inspector's admission of some wetness provides corroboration as to the trustworthiness of his statements.

More specifically, with regard to the probability of explosion,⁴ the record reveals that the first violation did not involve float coal dust. (Tr. 210.) Although there was such dust involved in the second violation, the situs was 2,000 feet from the working faces in an area where methane is liberated in minute quantities and is unlikely to collect. (Tr. 218, 232, 240-1.) Furthermore, as North American points out, the inspector admitted that there was no ignition source in connection with the first violation (Tr. 196), and there was no evidence of an ignition source with respect to the second. Finally, the record shows that the last explosion at the Kenilworth Mine took place in 1945. (Tr. 128-29, 217.)

On the basis of the foregoing evidence of record, we find with regard to both the subject violations, that the likelihood of fire or explosion was remote. We therefore conclude, contrary to the Judge, that the violations were not serious. Having

reached this conclusion, we reduce the assessment for the violation cited in the September 22 order from \$600 to \$300 and we reduce the assessment for the violation cited in the November 10 order from \$1,000 to \$500.

3. Section 304(d) Charges

Order of Withdrawal 1 JF, dated September 2, 1971, and *Order of Withdrawal 1 TJD*, dated September 16, 1971, charged North American, pursuant to section 304(d), 30 U.S.C. § 864(d), 30 CFR 75.403, with inadequate rock dust along the floor. The Judge concluded that the former violation was very serious and that it was the result of gross negligence. With respect to the latter violation, he held the condition cited to be serious and the result of a pattern of negligent conduct. North American challenges each of these findings on appeal.

Turning first to the September 3 violation, we note that the evidence reveals that the samples taken by the issuing inspector ranged anywhere from 10.0 to 38.4 in terms of percentage of incombustible content, levels which are substantially below the 65% required by the Act. Dec. 6. It is true, however, that the record also reveals that the roof and ribs nearby were adequately rock dusted (Tr. 460, 468, 478), that methane was well within the regulatory limits required for compliance (Tr. 459, 481), and that no permissibility violations representing ignition sources were detected (Tr. 465, 481). Moreover, at the time of

⁴ North American cites 30 CFR 45.28-1 in support of its gravity argument. That regulation is no longer effective. See *Eastern Associated Coal Corp.*, 3 IBMA 383, 81 I.D. 627, 1974-1975 OSHD par. — (1974).

the inspection no coal mining was going on in the particular section where the subject order was issued.

In our view, the substantial disparity between the percentages of incombustible content found and those that are statutorily required shows that this violation was not only palpable but that the condition had persisted for quite some time. In these circumstances, we think that the Judge did not err in finding North American to be grossly negligent in allowing this violation to occur. However, inasmuch as this working section was not in operation and because there was no sufficient showing of an ignition source or unpredictably dangerous levels of methane, we must find that the likelihood of fire or explosion was not great and that the violation was therefore not serious. Accordingly, we are reducing the penalty assessed from \$1,500 to \$1,000.

The evidence with respect to the section 304(d) violation cited in Order 1 TJD is very similar to that presented with regard to the violation cited in Order 1 JF. The related roof and rib areas were adequately dusted as was the floor between the areas found to be in violation and the working faces. (Tr. 529.) There were no permissibility violations detected (Tr. 528), and methane levels were acceptable. (Tr. 525, 527.) By contrast, the area covered by this violation was 225 feet which was considerably less than that involved in the previous violation (Tr. 523, 529). *Dec 7.*

Once again, because the evidence shows that the likelihood of an explosion or fire was small, we must conclude that the violation was not serious. However, we agree with the Judge that the condition was the result of simple negligence; the area was sufficiently extensive to persuade us that a reasonable man would have detected and corrected the deficiency in incombustible content.⁵ Accordingly, we are reducing the assessment from \$1,200 to \$800.

4. 30 CFR 75.1003(a) Charge

Notice No. 1 FWT, dated February 1, 1972, cited North American for failure to install a trolley guard. The Judge concluded that this failure was the result of negligence because the company was aware of the requirement, having been previously cited for a similar violation. (Tr. 650, 659.) North American contends that the Judge's ultimate finding ignores the alleged difficulty of obtaining the subject trolley guard. (*Id.*)

Whether or not North American was aware that 30 CFR 75.1003(a) requires a trolley guard to prevent exposed wires is irrelevant to the determination of negligence herein

⁵ North American points out that the Judge considered the history of three prior occurrences of violation of 30 CFR 75.403 in reaching an assessment. While it is true that these previous violations are irrelevant to determining if the present one was the result of negligence, such evidence is pertinent in applying the criterion of previous history of violation. Thus this factor was properly an element to be considered in fixing the assessment amount and it does not matter whether the Judge took it into account in applying the negligence criterion since there was independent evidence to support his ultimate conclusion of fact and law as to that issue.

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because an operator is presumed to know the requirements of the law and will not be heard to plead ignorance of the law in defense. See *Freeman Coal Mining Co.*, 3 IBMA 434, 442, n. 7, 81 I.D. 723, 1974-1975 OSHD par. 19, 177 (1974). The real question is whether North American unreasonably failed to prevent a violation of the legislated standard of care from occurring. The evidence of record, while by no means as full as might be desired, is uncontradicted with regard to the shortage of the missing trolley guard. Moreover, there is nothing in the record to suggest that North American failed to take all reasonable actions to obtain the guard. On the facts of this record, we must conclude that the failure to have the guard was inadvertent and was not the product of negligence.

Accordingly, the assessment of \$300 will be reduced to \$25.

B.

[2] Apart from challenging some of the Judge's findings made with respect to negligence and gravity, North American also claims that there was error in the refusal to take into account losses sustained as a result of a vacated withdrawal order, 1 FWT, dated January 31, 1972, in assessing a penalty for the violation cited in that order. The violation in question was an alleged deviation from the approved roof control plan. 30 CFR 75.200.

The Judge concluded that the production losses sustained by

North American were not proximately caused by the subject withdrawal order. He also stated at page 14 of his opinion:

It may be that some production was lost between the time the roof was secured, so that the operator could legally commence extracting coal, and the termination of the withdrawal order. But, in the absence of any evidence suggesting such a time lapse, I am unable to make a finding that the operator suffered a monetary loss because of the improper issuance of the withdrawal order.

North American points out, and we agree, that the above-quoted statement is in contradiction of the initial conclusion of no proximate cause. In addition, North American claims that there is credible evidence of record tending to show that there were economic losses directly traceable to the subject withdrawal order. In view of the self-contradictory nature of the opinion below and in light of the lack of transcript citations, we have decided to review this final phase of North American's appeal *de novo*. 43 CFR 4.605.

The withdrawal order was issued at 10:30 a.m. on January 31, 1972, and it called for the withdrawal of all persons not essential to abatement from the face areas of Nos. 1, 3, 4, and 5 entries in the main east section. By 3 p.m. on the same day, North American had taken sufficient remedial action with respect to Nos. 1, 4, and 5 entries to persuade the inspector to modify the withdrawal order so that it included only the No. 3 entry. The modified order was subsequently terminated at 9 a.m. on February 1, 1972. Some six

months later, on August 3, 1972, the withdrawal order now in issue was administratively vacated, it having been found to be null and void *ab initio*. Govt. Ex. No. 13. On the basis of these facts, we find that North American did suffer economic losses which were the proximate result of the subject withdrawal order. Taking these losses into account as a *general* mitigating factor, we reduce the Judge's assessment of \$1,000 to \$500.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision pursuant to remand in the above-entitled case IS MODIFIED in accordance with the foregoing opinion and North American SHALL PAY the penalties assessed in the amount of \$4,875 on or before thirty days from the date of this decision.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

CO-OP MINING COMPANY

3 IBMA 533

Decided December 31, 1974

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by an Administrative Law Judge (Docket No. DENV 73-13-P),

dated June 28, 1973, insofar as it vacated two notices of violation in a civil penalty proceeding pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969.¹ The decision assessed penalties totaling \$355 for other violations not here appealed.

Reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Incombustible Dust Program: Test Reports

An analysis of dust samples report indicating a violation can be admitted as evidence upon proper foundation under 28 U.S.C. § 1732 (1970) and, if admitted, is considered a *prima facie* showing of a violation.

APPEARANCES: William H. Woodland, Esq., for appellant, Mining Enforcement and Safety Administration; Carl E. Kingston, Esq., for appellee, Co-Op Mining Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

At the outset, we note that Co-Op in its reply brief states: "MESA's phrasing of the Issue Presented and Statement of the Case (in its brief filed August 7, 1973) are accepted by appellee as substantially accurate and factual." In view of this we will accept MESA's 'Statement of The Case' as follows:

On December 15, 1971, and February 9, 1972, Federal Coal Mine Health and Safety Inspector, Parley DeLyle Hinkins,

¹ 30 U.S.C. §§ 801-960 (1970).

acting as an authorized representative of the Secretary of the Interior, made inspections of Co-Op Mining Company's Co-Op Mine. During those inspections, a routine acceptable procedure was followed to collect mine dust samples. (Tr. 50-53, 113-115.) Following routine procedure, these samples were prepared and mailed to the Bureau of Mines [now MESA] testing facility in Pittsburgh, Pennsylvania. The results of the laboratory analysis of the incombustible content in this material was prepared at the laboratory, typed into a standard form report and received by the Inspector by return mail. Finding that the results showed that certain of the areas of the mine had a content of incombustible material below the accepted standard he issued Notices of Violation, 1 PDH dated December 27, 1971, and 1 PDH dated February 9, 1972.

A hearing was held in Price, Utah, on Tuesday, March 6, 1973, pursuant to Section 109(a) of the Act, at which, among other items, the above alleged violations of safety standards were considered. Inspector Hinkins was called to testify regarding both alleged violations, at which time he described the procedures used in collecting samples, preparing and mailing them to the testing laboratory (Tr. 51-53). Another inspector, Thomas J. Dickerson, knowledgeable of the laboratory procedure at Mt. Hope, West Virginia also testified as to those procedures. (Tr. 130-137.) Appellant introduced copies of the laboratory test results. One report was accepted and the other refused by the Administrative Law Judge.

By Decision of June 28, 1973, the Administrative Law Judge (Judge) vacated both of the above alleged violations on the grounds that the test results were hearsay evidence and that no additional corroborative evidence was introduced which would support a finding that the mine dust samples contained insufficient incombustible material.

Contentions of the Parties

MESA contends that the Judge erred in refusing to consider the evidence presented as it related to the reports of laboratory analysis of the incombustible content of mine dust samples and relies upon the provisions of 28 U.S.C. § 1732. It asks that we reverse the Judge's decision and find a violation of the standards as related to both Notices of Violation.

Co-Op contends that a foundation sufficient for the proper acceptance of the offered evidence under 28 U.S.C. § 1732 was not made in that there was no testimony from a person in a position to attest to the authenticity of the reports, and concludes that the Judge's decision should be affirmed.

Issue Presented

As did Co-Op, we accept the phrasing of the issue presented on appeal as set out in MESA's brief as follows:

Whether or not the Administrative Law Judge erred in rejecting appellant's proffered exhibit showing the results of the Bureau of Mines' laboratory tests for incombustible content of the mine dust sample, and vacating another similar Notice of Violation because no corroborative evidence other than a copy of test results was received into evidence.

Discussion

At the hearing, MESA offered into evidence two reports (marked

as Government Exhibits No. 1 and No. 2) prepared in furtherance of the Federal Coal Mine Health and Safety Act of 1969 (the Act) and regulations issued pursuant thereto. The offer was based on the provisions of the Business Records Act, 28 U.S.C. § 1732 which provides as follows:

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. (Italics added.)

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. *Such repro-*

duction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. (Italics added.)

[1] We take official notice of the fact that the Secretary of the Interior has established a procedure for taking samples and determining by laboratory method the incombustible content of dust in furtherance of the obligation imposed upon him by section 304(d) of the Act. We also take official notice of the procedure established for the submitting of dust samples, the testing procedure, and reports thereon, set forth in the Coal Mine Safety Inspection Manual for Underground Mines, of December 1971, which was in effect at the time of the alleged violations. We further take notice that the methods used in the testing procedure are of general knowledge in mining circles and conceded to be in keeping with well-known scientific principles and practices, and that such testing procedures and techniques are followed in each of the several laboratories established by the Secretary for such purposes. Additionally, unless shown to the contrary, we presume that the Secretary's orders and

instructions for the taking of samples and issuance of test reports thereon are carried out by his employees. Therefore, we find that the making of such reports is a required and regular part of the business of MESA. The reports, being records of an act, occurrence, or event made in the regular course of business, clearly fall within the language of section 1732, *supra*.

Reports of this type are no less admissible under section 1732 even in cases where they contain conclusions based on hearsay or matters of opinion. These matters of content of the report by express statutory provision go to weight rather than to admissibility.² In the instant case, however, the proffered reports do not contain any such matters of opinion. They contain only a numerical analysis of the dust samples submitted, showing the percentage of incombustible content; *i.e.*, they contain only *factual data* recorded as a result of a test. The *contents* of the reports have the earmarks of reliability or probability of trustworthiness. They constitute the only evidence available to support the alleged violations. Therefore, when admitted into evidence, if such a report shows that the percentage of incombustible content does not meet the required standard, it establishes a *prima facie* case of a violation. Of course, the operator may attack the accuracy and the reliability of the report itself, the regularity of the test procedure, and offer any

other evidence it has in rebuttal. But where no such challenge is made, or where the Judge finds such challenge does not meet or overcome the presumption of verity which attaches to the report, the Judge is left with a *prima facie* showing that a violation did, in fact, occur.³

Co-Op's argument in this appeal is that the *excluded* report did not qualify for admission in evidence under 28 U.S.C. § 1732 (1970), because the Inspector who issued the Notices of Violation admitted that he had no personal knowledge of the testing procedure followed at the Pittsburgh laboratory where the tests were made, and therefore was not qualified to attest to the authenticity of the report, *i.e.*, that no proper foundation was laid. We do not agree. Two MESA inspectors testified at the hearing. Inspector Hinkins, who took the samples, mailed them to the laboratory, and received the report here in question, testified as to the procedures used in collecting the dust samples, preparing and mailing them to the laboratory, and the receipt of the test results. He also identified the report in question as being the report on the samples he submitted. A second inspector, Mr. Dickerson, knowledgeable of the laboratory procedure at Mt. Hope, West Virginia, testified as to those procedures. Inasmuch as the laboratory procedure and the method of testing dust samples at the Mt. Hope

² See *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467, 473 (3d Cir. 1950).

³ See *Kuklis v. Hancock*, 428 F.2d 608, 613 (5th Cir. 1970), and *Thomas v. Hogan*, 308 F.2d 355, 361 (4th Cir. 1962).

laboratory are the same as those used at the Pittsburgh laboratory, the fact that neither Inspector Hinkins nor Dickerson had personally observed the procedures at Pittsburgh does not damage the credibility of their testimony that the report was the product of a regular and prescribed routine of business with which both were familiar. This is all that was necessary for a presumption of regularity to attach to the report and to qualify it for admission as a business document. We believe the Judge erred in refusing to admit it under 28 U.S.C. § 1732 (1970), *supra*.

In the case of the report which was admitted into evidence as hearsay but given no weight by the Judge, the record reveals that Co-Op made no attempt to rebut either the presumption of regularity or the accuracy of the contents. While it attacked generally the reliability of the procedures followed, it offered no evidence to show that such procedures were inadequate, improper, or resulted in an unreliable or inaccurate report. In this instance the Judge admitted the report but gave it no weight for the stated reason that it was uncorroborated, hearsay evidence. The term "corroborating evidence" means evidence supplementary to that already given and tending to strengthen or confirm it, or additional evidence of a different character to the same point.⁴ We are inclined to believe that the Judge mis-

applied the term "corroboration" in this instance, since it appears he intended to question the foundation for the report's admission rather than its weight. In our view, there would be no way to corroborate a laboratory test report except by another laboratory test. If the Judge was questioning the authenticity of the document itself or the fact that it was offered as a copy, rather than the original, we point out that section 1732 does not require that either an original or authenticated copy be submitted.⁵ All that is necessary is that the report be properly identified. Here again, we find that the Judge properly should have admitted the report under section 1732, and in the absence of rebutting evidence should have considered it as a *prima facie* showing of a violation.

In holding as we do that both of the reports qualified for admission as business records under section 1732, and, in the absence of any evidence in rebuttal, would stand as a *prima facie* showing of the violations cited, we are not unmindful of the fact that Co-Op had no reason or no opportunity at the hearing to rebut MESA's showing with respect to Notice of Violation No. 1 PDH dated December 27, 1971, since the laboratory report supporting the Notice was excluded from evidence by the Judge. Inasmuch, however, as Co-Op did have an opportunity but did not produce any evidence

⁴ Black's Law Dictionary, Fourth Edition, 1951.

⁵ As a matter of fact, originals of all such reports are kept on file by MESA and are available.

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which in our opinion would serve to meet or overcome the *prima facie* showing made by MESA in support of Notice of Violation No. 1 PDH dated February 9, 1972, we do not think it unreasonable to presume that Co-Op would be unable to produce such evidence to successfully rebut a *prima facie* showing of the earlier violation under our holding herein. The factual backgrounds of the two situations are identical. Consequently, although we find that the Judge erred in his decision to vacate both Notices and hold that both are reinstated, we are reluctant to remand the case to the Judge for further proceedings. In view of the inordinate length of time which has elapsed since issuance of the Notices, the undue delays which have occurred in the hearing and appeal procedures, and considering the nature of the case itself, we think it would be an offense to common sense to further prolong a final decision by requiring further proceedings. We believe it to be in the best interest of justice to the parties and all concerned to conclude the case at this point.

Therefore, we find that the two violations, cited in Notice No. 1 PDH, dated December 27, 1971, and Notice No. 1 PDH, dated February 9, 1972, did occur and that a penalty of \$1 each is assessed. In determining that only a nominal penalty is appropriate in this case we are mindful of the statutory requirement of section 109(a)(1) of the Act that certain criteria set forth therein be considered. Insofar as the

record before us permits we have considered these criteria. We have also considered the time and expense to all concerned which would be required to develop a factual record of matters which occurred during 1971, and the provision of section 105(c) of the Act requiring that review actions shall be taken as promptly as practicable consistent with adequate consideration of the issues involved. We believe adequate consideration had been given to the applicable statutory requirements and that the purely nominal amounts assessed are appropriate under all of the circumstances.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Co-Op Mining Company is directed to pay the civil penalties assessed in the amount of \$357 within 30 days from the date of this decision.

C. E. ROGERS, JR.,

Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,

Alternate Administrative Judge.

ADMINISTRATIVE JUDGE
DOANE, DISSENTING:

The majority finds two violations of section 304(d) of the Act, cited under 30 CFR 75.403, and assesses penalties therefor primarily on the

basis of two pieces of paper marked for the record as Government Exhibit Nos. 1 and 2.¹ These two documents were purported to be copies of relevant laboratory test results of the incombustible content of dust samples. Both are devoid of any indication of source and neither was signed, initialed, authenticated, verified, certified or substantially supported by the testimony of a single competent witness. Believing as I do that the majority opinion misconceives the issue, misapplies the law, and could impede the establishment of a proper standard of proof policy in future penalty cases, I must respectfully dissent.

I would vacate the two notices of violation involved here, as did the trial judge, on the ground that neither the Government's rejected evidence nor its admitted evidence is reliable, probative or substantial. The rationale for this dissenting view is detailed in the following discussion.

The Real Issue

The briefs of the parties, as well as the majority opinion, needlessly devote considerable discussion to the question of the admissibility of Government Exhibit Nos. 1 and 2 under 28 U.S.C. § 1732, the federal shop-book rule. They extensively discuss whether a proper foundation was laid for the application of such rule in order to cope with the

objections to the admission of the exhibits as hearsay.

This discussion was unnecessary because the hearing in this proceeding was required to be conducted pursuant to the rules of the Administrative Procedure Act,² and section 1006(d) of that Act, 5 U.S.C. § 556(d), *permits* the admission of hearsay evidence, provided it is not irrelevant, immaterial, or unduly repetitious. The pertinent part of 5 U.S.C. § 556(d) provides as follows:

* * * Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. * * * (Italics supplied.)

Administrative agencies generally are not restricted in the kind of evidence they can admit. The mere admission of proof that would be excluded as irrelevant, immaterial, incompetent, or redundant under the rules of evidence adopted in a jury trial will not restrict enforcement of an agency's decision.

² Section 109(a)(3) of the Act, 30 U.S.C. § 819(a)(3), provides in pertinent part as follows: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing * * *. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code." Subsection (a) of section 556 of title 5, U.S.C. provides as follows: "This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." Subsection (c) of section 554 of title 5, U.S.C. provides in pertinent part: "The agency shall give all interested parties opportunity for * * * hearing and decision on notice and in accordance with sections 556 and 557 of this title."

¹ Copies of these two exhibits are attached as Appendix I and Appendix II to this dissenting opinion.

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The APA pointedly omits hearsay or other "incompetent" evidence from the list of evidence which should not be received. Thus, the exclusion of otherwise legally inadmissible evidence from an administrative hearing may be error.³

The principal reasons for admitting hearsay in administrative hearings are: (1) the exclusionary rules do not determine the probative value of proffered evidence and the reliability of both hearsay and non-hearsay evidence ranges from the least reliable to the most reliable; (2) it makes no sense to require a trial examiner to refuse to admit hearsay where there is no jury to protect and the trier of fact is equally exposed to the evidence whether he admits it or excludes it; and (3) discarding the exclusionary rules of admission eliminates the need for parties to interpose protective objections, relieves the hearing officer of making difficult rulings before all the evidence is available, and assures a complete, but not unduly long, record and might well avoid the need to reopen the record.⁴

Another provision of 5 U.S.C. § 556(d), ignored by the majority opinion, but which I believe to be directly applicable to the decision in this case, reads as follows:

A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof

cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

Thus, on the basis of the foregoing discussion, I submit that whether the hearsay Exhibit No. 1 should have been admitted is not the real issue here. Although I admit that the Judge did not explain very well why he rejected Exhibit No. 1 and admitted Exhibit No. 2, the real issue before the Board in this appeal is whether the Judge erred in giving no probative weight to either exhibit and in holding, in effect, that the evidence of record was insufficient to justify the imposition of penalty assessments for the violations charged.

Determining Reliability, Probative Weight, and Substantiality of Hearsay Evidence

According to *Black's Law Dictionary* (4th ed. 1951), the following terms are defined as follows:

Reliable: Trustworthy, worthy of confidence.

Probative: In the law of evidence. Having the effect of proof; tending to prove, or actually proving. Testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason co-operating as co-ordinate factors.

Substantial: Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. Something worth while as distinguished from something without value or merely nominal.

In an administrative hearing, as in the case of nonjury trials, it is

³ See *McCormick's Handbook of the Law of Evidence*, § 350 (2d ed., Edward W. Cleary, et al., 1972); Gellhorn, *Administrative Law and Process*, pp. 177-180 (1972); and Kenneth Culp Davis, 2 *Administrative Law Treatise*, §§ 14.07, 14.08, 14.09 (1958).

⁴ *Ibid.*

assumed that the trial examiner will not rely upon untrustworthy evidence in reaching his decision. Thus, *if there is* "competent" or trustworthy evidence to support the decision, the reviewing Court presumes that the examiner or trial judge relied on that evidence in reaching his decision.⁵

Nevertheless, the more difficult—and often crucial—question for the hearing officer is the determination of whether he should rely upon hearsay evidence in reaching his decision. The examiner's concern is with the reliability or probative worth of the evidence.⁶

The fact that some hearsay may prove reliable is no guarantee that all hearsay is reliable. The courts have provided only scant guidance in upholding administrative reliance on some hearsay evidence. Judge Learned Hand, in *NLRB v. Remington Rand*, 94 F.2d 862, 873 (2d Cir. 1938), has offered the classic formulation:

[The examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides * * *. [N]o doubt, that does not mean mere rumor will serve to "support" a finding, but hearsay may do so at least *if more is not conveniently available*, and if in the end the finding is supported by *the kind of evidence on which responsible persons are accustomed to rely in serious affairs*.⁷ (Italics added.)

Additional criteria applied in evaluating the reliability of hearsay can be discerned from the general case law. The following are the most

significant: (a) What is the "nature" of the hearsay evidence? (b) Is better evidence available? (c) How important or unimportant is the subject matter in relation to the cost of acquiring "better" evidence? (d) How precise does the agency's fact finding need to be? (e) What is the administrative policy behind the statute being enforced?⁸

Evaluation of the Evidence of Record

In addition to the two questioned documents, and a stipulation described hereafter, the only other evidence offered by the Government to establish that the alleged violations occurred was the testimony of two federal inspectors.

Mr. Parley DeLyle Hinkins, the inspector who issued the notices of violation, testified that on December 15, 1971, he, together with the mine manager, Mr. Bill Stoddard, took certain dust samples according to required procedure, and, after taking a particular sample, "We put it in a white plastic bag and put a card on it to identify it and the area that it came from, and we mailed it to Pittsburgh, to the laboratory there."⁹ (Tr. 50-52.)

Mr. Hinkins further testified that he was not familiar with what happens to a sample after he deposits it in the mail. He knew only that the sample goes to Pittsburgh for testing. He was not familiar with the

⁵ McCormick, *supra*, § 351.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ A literal reading of this testimony raises the question of whether he actually mailed four samples or only one sample.

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Pittsburgh laboratory nor had he studied the procedures used in that laboratory. When asked to identify Government Exhibit No. 1, he responded:

Yes, this is the four samples that I tested. This was with Mr. Stoddard on December 15, '71. These were spot samples. (Tr. 52.)

Mr. Hinkins also testified that he followed substantially the same procedure in taking the samples pertaining to the second notice, 1 PDH, dated February 9, 1972, as that used for taking the first set of samples. (Tr. 113.)

Mr. Thomas J. Dickerson, the other inspector witness for the Government, testified that he had spent four days in a laboratory in Mt. Hope, West Virginia, to determine how samples were tested. He presented a detailed account of the laboratory procedure which he observed, and he concluded that the procedure was reliable. (Tr. 131-138.) Mr. Dickerson also testified that he had not visited the laboratory at Pittsburgh. (Tr. 138.)

According to Mr. Dickerson, the samples cited in Government Exhibit No. 1 were tested in Pittsburgh while he thought the samples cited in Government Exhibit No. 2 were tested in Mt. Hope, West Virginia. (Tr. 139-140.) Mr. Hinkins then testified that he was "not sure" where the samples cited in Exhibit No. 2 were sent. He did not recall "* * * just exactly just where I mailed these to." (Tr. 140.)

Finally, on April 5, 1973, the Judge having left the record open

to permit the Government time to submit additional evidence by written interrogatives relating to tests performed at the laboratory at Mt. Hope (Tr. 145), the parties stipulated that regardless of any testimony at the hearing, "* * * the analysis of the dust samples, a copy of the results of which were received and entered in evidence as Government Exhibit No. 2, were performed in the Bureau of Mines laboratory at Pittsburgh, Pennsylvania."

The Government by this evidence seeks to prove that Co-Op violated 30 CFR 75.403 by not maintaining an incombustible content of the combined coal dust, rock dust, and other dust in the mine area at not less than a given percentage. It would seem, therefore, that in all fairness to the operator, some proof that the percentage figures on the document offered to establish a violation represent a true, correct, and accurate portrayal of the combustible content of the samples submitted by the inspector.

Co-Op's mine manager was apparently with the inspector when the samples in this case were taken. No objection to the method of taking the samples from the mine was made, probably for that reason. However, the operator did not see how the laboratory tests were performed, or by whom. He had no way of knowing from the *evidence of record* in this case: (1) whether the samples taken from his mine were actually the same samples referred to on the two exhibits; or (2) whether the laboratory tests were

performed by one or more qualified and authorized laboratory technicians; or (3) if so, whether the method employed in the purported analyses is scientifically acceptable. Certainly, without even identifying earmarks showing in what laboratory, if any, the analyses were prepared and with no initials, signature or other written verification or authentication of any kind appearing on them, the originals of the two documents cannot be said to be intrinsically trustworthy.¹⁰

The testimony of the two inspectors is virtually useless regarding the laboratory processing since neither of them was familiar with or had ever been to the Pittsburgh laboratory. The stipulation did establish, at least with respect to Exhibit No. 2, that the *analyses* it purports to represent were performed in the Bureau of Mines laboratory at Pittsburgh. But the stipulation does not show by whom they were performed or in what manner; and it does not show where or by whom the exhibit itself was prepared.

The Statement of the Case, contained in MESA's Brief, at page 2, states:

The results of the laboratory analysis

¹⁰ In its opinion, the majority does not advert to the fact that they are dealing with copies, and they never come to grips with the requirement in 28 U.S.C. § 1732(b) of satisfactory identification of reproductions. Moreover, they completely ignore 28 U.S.C. § 1733 (b) which provides:

"Properly authenticated copies or transcripts of any books records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof." [Italics added.]

of the incombustible content in this material was prepared at the laboratory, typed into a standard form report and received by the inspector by return mail.

I consider this statement to be entirely self-serving and perhaps a statement of what counsel for MESA wanted to prove or thought he had proved, but there is no evidence whatever in the record to support it.

I would evaluate the reliability of the hearsay evidence, Exhibits 1 and 2, by application of the criteria itemized under the previous sub-heading as follows:

(a) The nature of the hearsay is that it consists of two documents, improperly identified, without any authentication whatsoever, and having no intrinsic verity.

(b) Better evidence is readily available. At least, the form could be revised to show a letterhead or seal of the Bureau of Mines laboratory, with a verification imprinted or stamped thereon, dated and signed by the laboratory technician who performed the analyses, and certifying that he was qualified and authorized to make the analyses, that the analyses were made in accordance with specified and generally accepted scientific laboratory procedure, and that the results shown accurately reflect the true percentages of incombustible content found in the samples analyzed.

(c) The importance of the evidence is crucial for the purpose of providing a reliable basis upon which the ultimate finding that a violation occurred can be made. The cost of acquiring the better evidence, as described in (b) above, would be nominal.

(d) The fact finding in this proceeding needs to be precise enough to comply with the requirements of 5 U.S.C. § 557 (c) (A) of the APA, which are to make findings on all material issues of fact and show the reasons or basis therefor.

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(e) The administrative policy behind the statute being enforced is presumably that any civil penalties assessed against a coal mine operator shall be for violations proved on the basis of reliable, probative, and substantial evidence as required by 5 U.S.C. § 556(d) of the APA.

Finally, I evaluate the subject hearsay evidence adduced in this proceeding in terms of Judge Hand's formula, as *not* " * * * the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

Official Notice and Presumptions

The majority impliedly recognizes that the record made below is fatally lacking in sufficient reliable, probative, and substantial evidence to support findings of violation when it resorts to official notice and the creation of a presumption in order to overcome the deficiencies of the evidence of record as shown above. Specifically, the majority takes official notice of procedures supposedly established by the Secretary for the collection and laboratory analysis of dust samples and of the December 1971 edition of the Department's *Coal Mine Safety Inspection Manual for Underground Mines*. It also takes " * * * notice that the methods used in the testing procedure are of general knowledge in mining circles and conceded to be in keeping with well-known scientific principles and practices, and that such testing procedures and techniques are followed in each of the several laboratories established by the Secretary for such pur-

poses * * *." Having taken notice of all these alleged procedures, the majority caps its argument with the presumption that the procedures are in fact carried out in every case, presumably including the one at bar unless shown to the contrary.

In my opinion, the consideration of *extra-record* information and materials which are not a matter of common knowledge to the general public is usually precluded as a matter of law. The practice in which the majority indulges in order to sustain the Government's case effectively denies the right to a trial-type hearing in penalty cases which Congress specifically granted in section 109 of the Act. *Cf. Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292 (1937). Since the principal evidence supporting the majority's view was never put into the record before it was closed, Co-Op has never been accorded the *opportunity* for rebuttal which is the very essence of the hearing right. *Glendenning v. Ribicoff*, 213 F. Supp. 301 (D. Mo. 1962); *UNA Chapter, Flight Engineers' Intern. Assn., AFL-CIO v. National Mediation Board*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); *cf.* 5 U.S.C. § 556(e) (1970).

Furthermore, even if I thought that official notice in these circumstances were proper, I would still quarrel with those matters noticed by the majority. Although the majority opinion refers to Secretarial procedures, it does not cite any officially promulgated regulations is-

sued and signed by the Secretary or his lawful delegate. The only Departmental publication to which the majority adverts is the December 1971 *Coal Mine Safety Inspection Manual for Underground Mines*. However, while this manual does contain instructions to inspectors with regard to sampling and handling, it does not describe the processing and testing procedures at the laboratory in any great detail, and despite the majority's contention that the laboratory methods are of "general knowledge," I, for one, remain unenlightened as to what they are and have no basis upon which to conclude that they are scientifically acceptable. *Glendenning v. Ribicoff, supra*.¹¹

Finally, I must take exception to the creation by the majority of a presumption to the effect that the supposed procedures attributed to the Secretary were in fact followed in the case at hand. In my judgment, such a presumption amounts to little more than a statement by the majority that Government employees can do no wrong in processing laboratory samples. Except in default situations, I would hold that proof that the prescribed procedures were followed in the case at hand is essential in order to establish a *prima facie* case. 43 CFR 4.544.

¹¹ The Secretary in his discretion could hold a rulemaking proceeding pursuant to the Act to establish the reliability of the scientific methods and procedures employed in the Department's laboratories for determining incombustible content. The rules which would result from such a proceeding would obviate the necessity of proving reliability in every adjudicative hearing pursuant to section 109.

Standard of Proof Policy

The evidentiary problems posed by laboratory analysis reports and computer printouts are complex and technical. The Departmental personnel engaged in this kind of processing, and who initiate the documentary evidence designed to prove the efficacy of the laboratory testing results are not lawyers and are not responsible for the legal deficiencies of such evidence.

However, the Department does have, I think, an affirmative responsibility to establish a standard of proof policy of the highest quality when seeking to impose the sanction of a civil penalty. This objective can be best accomplished by appropriate rulemaking, or in the alternative, by decisions of the Board within the exercise of its adjudicative jurisdiction. The principal impetus for my dissent is the belief that the majority opinion effectively sidesteps that responsibility and condones a very anemic standard of proof which does not, in my opinion, conform to either the letter or the spirit of section 556(d) of the APA.

In addition, the unique provision of section 109(a)(4) of the Act, as a practical matter, suggests that the standard of proof required for jury trials might just as well be required for our administrative penalty proceedings, particularly, as here, when the evidence needed to meet that standard is so readily available. That section provides for a proceeding in a United States Dis-

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trict Court to enforce an order of the Secretary assessing a civil penalty, when an operator fails to pay within the time prescribed; but, *it requires that all issues of fact be submitted to a jury* while all other issues are reviewed *de novo* by the court. Under this circumstance, I submit that counsel for MESA might just as well produce that kind of evidence in the administrative penalty proceeding, which would be admissible and held to be substantial in a subsequent United States District Court proceeding. By this procedure, counsel for the operators might be convinced that the Government has the proof to sustain its allegations and might be

inclined to advise their clients that refusal to pay the administrative assessment would be useless and futile and would result only in additional costs of litigation.

Finally, I believe that all public officials should use their powers to impose sanctions *only* after those charged with prosecution and enforcement responsibilities have clearly demonstrated that the imposition of such sanctions is justified. To assure public confidence in administrative adjudications, a high standard of proof policy must be established and maintained.

DAVID DOANE,
Administrative Judge.

GOVERNMENT EXHIBIT 1

ANALYSES OF DUST SAMPLES

TABLE 2

MINE Co-op COMPANY Co-op Mining Company
COLLECTED BY Parley D. Hinkins DATE December 15, 1971

LAB NO.	SAMPLE NO.	SAMPLE OF DUST FROM	LOCATION OF MINE-SPOT LOCATION SAMPLES	AS REC'D PERCENT INCOMBUSTIBLE
J-85082	1	Band	Return Zero=45 feet outby No. 4 survey station in the return in No. 2 entry.	62.
J-85083	2	Band	Intake Zero=45 feet outby No. 3 survey station haulage roadway.	73.
J-85084	3	Band	Intake Zero=100 feet outby fault along haulage road.	75.
J-85085	4	Band	Return Zero=30 feet inby No. 2 stopping in the return entry.	67.

*By Volumeter.

DISSENTING OPINION APPENDIX I

GOVERNMENT EXHIBIT 2

ANALYSES OF DUST SAMPLES

TABLE 2

MINE Co-op		COMPANY Co-op Mining Company		
COLLECTED BY		DATE		
Parley D. Hinkins		January 24-25, 1972		
LAB NO.	SAMPLE NO.	SAMPLE OF DUST FROM	LOCATION OF MINE-SPOT LOCATION SAMPLES	AS REC'D PERCENT INCOM-BUSTIBLE
J-90335	1	Floor	Intake Zero=20 feet inby old 8 B. loading machine along the haulage road.	66.0
J-90336	2	Floor	Intake Zero=120 feet inby spad No. 31, No. 6 room in 2 right section.	28. *
J-90337	3	Floor	Return Zero=100 feet inby the 30 foot fault.	54. *
J-90338	4	Floor	Intake Zero=75 feet inby No. 2 material doors on the haulage road.	66. *
J-90339	5	Floor	Intake Zero=150 feet outby the face of No. 7 room in 2 right section.	47. *

*By Volumeter.

DISSENTING OPINION APPENDIX II

UNITED STATES

Reversed.

v.

ALAMEDA P. LAW ET AL.

18 IBLA 249

Decided *December 31, 1974*

Appeal by the United States from that portion of a decision by Administrative Law Judge Rudolph M. Steiner which dismissed contestant's complaints against four desert land entries (R 07370, etc.); and appeal by one of the contestees from that portion of the Judge's decision in which he refused to rule on the statutory life remaining in her desert land entry (LA 039326).

1. Desert Land Entry: Generally—
Desert Land Entry: Assignment—
Desert Land Entry: Cancellation—
Desert Land Entry: Cultivation and Reclamation

Where a group of desert land entrymen have leased their entries for a term of 15 years, with an option to purchase at the end of the lease, given full control of the entries to the lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a

corporation, and holding of more than 320 acres of desert land by one person or association. Accordingly, the entries must be canceled.

The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run.

2. Desert Land Entry: Generally— Desert Land Entry: Cultivation and Reclamation—Contests and Protests: Generally

An applicant whose desert land entry, suspended for many years by the decision in *Maggie L. Havens* and who was allowed the 19 months provided by the Secretary's notice of December 2, 1965, to submit proof of compliance with the requirements of the Desert Land Act, is not to be given further time when the evidence adduced in a contest against the entry shows that compliance with the cultivation and reclamation requirements of the desert land law was not accomplished within the life of the entry; the existence of a contest against the entry does not suspend the entry while the contest is pending and thus permit compliance with the requirements for perfection of the entry beyond the statutory life of the entry.

APPEARANCES: R. B. Whitelaw, Esq., El Centro, California, for the contestees; George H. Wheatley, Esq., Office of the Solicitor, for the contestant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management has appealed from that portion of the May 21, 1971, decision of the Administrative Law Judge,¹ which dismissed the allegations in its complaints against four desert land entries involved in this consolidated contest proceeding.² Contestee Inez Mae Pearson has appealed that portion of the decision in which the Judge refused to express an opinion as to the statutory life remaining in her entry, LA 039326, on which there have been no improvements or cultivation.

The four entries were made in the early 1900's but were suspended as the result of the Department's decision in *Maggie L. Havens*, A-5580 (October 11, 1923), until water for the irrigation of the lands became available from the Imperial Irrigation District through the anticipated construction of the All-American canal to bring Colorado River water into the Imperial and Coachella Valleys in California. The suspension was lifted in 1965.³ The Ala-

¹ Change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated by order of the Civil Service Commission, 37 FR 16787 (August 19, 1972).

² The proceeding dealt with the validity of the following desert land entries located in Imperial County, California:

R 07370 of Alameda P. Law, embracing the NW¼ Sec. 11, T. 16 S., R. 11 E., S.B.M.

LA 038793 of Earnest J. Pearson, embracing the NE¼ Sec. 11, T. 16 S., R. 11 E., S.B.M.

LA 039023 of Dorothy Nichols Pinkham, et al., embracing the N½NE¼ Sec. 12, T. 16 S., R. 11 E., S.B.M.

LA 039326 of Inez Mae Pearson, embracing the E½ Sec. 35, T. 15 S., R. 11 E., S.B.M.

³ The *Havens* suspension is more fully discussed *infra* in connection with the Inez Mae Pearson entry, LA 039326.

meda P. Law, Earnest J. Pearson and Dorothy Nichols Pinkham entries have been reclaimed by the construction of adequate irrigation facilities, and the entries have been cultivated.

The Administrative Law Judge has set out the facts as follows:

The Contestees seek acquisition of title to the subject lands pursuant to the Act of March 3, 1887 (19 Stat. 377) *as amended* by the Act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. 321 *et seq.*). Final proofs were filed in each entry, except R-039326, in February or March 1966.

The Contestant filed similar Complaints in each proceeding alleging generally that the entrymen, during May or June 1961, had leased the entries, with option to purchase, to E. J. McDermott and Kemper Marley, doing business as Pima Cattle Company, and pursuant thereto executed and delivered warranty deeds into escrow and that the rights and privileges of McDermott and Marley under the lease-option agreements have inured to the benefit of Pima Cattle Company, a California Corporation.

The Complaints further allege as follows:

(a) The aforesaid lease-option agreements and deeds constitute prohibited assignments of the entries to individuals who are ineligible to make a desert land entry in the State of California or to take such an entry by assignment in violation of Section 8, Act of March 3, 1877, as added by Act of March 3, 1891, 26 Stat. 1096, 1097 and *as amended* by Act of January 26, 1921, 41 Stat. 1086, 43 U.S.C. 325 and Section 2, Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. 324 (1964).

(b) The aforesaid lease-option agreements and deeds constitute prohibited assignments of the entries to or for the benefit of a corporation in violation of Section 2, Act of March 28, 1908 (*supra*).

(c) The aforesaid lease-option agreements and deeds constitute binding contracts of sale of the land in the entries

to be consummated after patents are issued.

(d) The entrymen and their predecessors in interest have failed to expend the amount required by law necessary for the irrigation, reclamation and cultivation of the land in the entries as required by Section 5, Act of March 3, 1877, as added by Act of March 3, 1891 (*supra*).

(e) E. J. McDermott and Kemper Manley, also known as Kemper Marley, doing business as Pima Cattle Company, and/or Pima Cattle Company, a California corporation, hold in excess of 320 acres of desert land in violation of Section 7, Act of March 3, 1877, as added by Act of March 3, 1891 (*supra*).

(f) The entrymen have not maintained the entries in good faith with intent to irrigate, reclaim and cultivate the land therein as required by Section 1, Act of March 3, 1877 (*supra*).

A hearing was held in El Centro, California.

The Contestant introduced in evidence those documents alleged to constitute prohibited assignments of entries [footnote omitted] to ineligible individuals, to benefit a corporation, and to result in a holding in excess of 320 acres by a single corporation.

By instrument dated June 16, 1961 (Exhibit 13), the Estates of Kitty H. Nichols and George W. Nichols, Sr., by Dorothy Nichols Pinkham, as "Administrator with Power of Attorney," leased the lands in the Pinkham entry, LA-039326, to "E. J. McDermott and Kemper Manley, doing business under the name and style of Pima Cattle Company, of 1720 Fifth Avenue, Yuma, Arizona." By instrument dated August 31, 1961, Dorothy Nichols Pinkham again leased the lands in the two entries to the same lessees.

By similar instrument dated May 22, 1961 (Exhibit 9), Earnest J. Pearson and Inez Mae Pearson leased the lands embraced by the other three entries to the same lessees. McDermott and Manley were residents of the State of Arizona at the time the leases were executed.

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Each lease runs for a term of 15 years with option to purchase after expiration of the term. Each provides for a "full rental price" of \$100 per acre due in annual installments of \$6 per acre. In the event of the failure of the lessees to make the payments provided for, the leases were to be terminated and all payments theretofore made were to be retained by the lessors as liquidated damages. The lessees were to pay all taxes and assessments levied by the Imperial Irrigation District. The lessees further agreed "to keep records and to be, or furnish, suitable witnesses who will jointly with Lessors, furnish and make said final proof."

The option clause reads, "It is mutually agreed as a part of the consideration for this lease that Lessees shall have and they are hereby given an option at the end of fifteen (15) years provided they have in the meantime kept and fully performed all the provisions of this Lease to have Lessors convey and transfer title to said lands to the Lessees, or to their designated grantees by a duly executed and acknowledged Warranty Deed now being placed in escrow upon the payment to them of the sum of FOUR THOUSAND EIGHT HUNDRED (\$4,800.00) DOLLARS."

The Bank of America, Brawley, California, was designated as the "escrow" or "collection" agent to collect the rental payments, credit the same to the lessor's account and to make delivery of deeds of conveyance to the lessees pursuant to the leases. By warranty deed dated July 24, 1961, and acknowledged August 31, 1961, Dorothy Nichols Pinkham conveyed the lands in the Pinkham entry and LA-038342, to E. J. McDermott and Marion McDermott, his wife, "or their nominees" (Exhibit 8). By grant deed dated February 23, 1962, and acknowledged the same date, Earnest J. Pearson and Inez Mae Pearson conveyed the lands in the Law and Earnest J. Pearson entries to the same grantees. (Exhibit 11.) A further grant deed was prepared for execution by Mr. and Mrs. Pearson in February

1962, for conveyance to E. J. McDermott and Kemper Marley, doing business under the name and style of Pima Cattle Company of the land in LA-039326, as well as the lands in R-07370 and LA-038793. (Exhibit 12.) Whether said deed was ever signed and acknowledged is not known.

Pima Cattle Company was incorporated under the laws of the State of California in 1962, by E. J. McDermott, Marion E. McDermott, and James L. Campbell, at that time all residents of the State of Arizona. (Exhibit 16.) E. J. McDermott and Kemper Marley, doing business under the name and style of Pima Cattle Company, granted, conveyed, sold, assigned, transferred and set over to Pima Cattle Company, a California corporation, their August 31, 1961, lease and option from Dorothy Nichols Pinkham and their May 22, 1961, lease and option from Earnest J. Pearson and Inez Mae Pearson. (Exhibit 8 and Exhibit 7, respectively.)

A concrete lined main irrigation ditch has been constructed from the West Side Main Canal of the Imperial Irrigation District across privately-owned land, then along the northern boundary of Desert Land Entries LA-039023, LA-038342, LA-038793 and R-07370, to serve the lands in these entries and privately-owned lands in the area. It was constructed by, and the costs thereof were paid by, either Pima Cattle Company, a partnership, or Pima Cattle Company, a corporation. (TR-96, TR-97 and TR-98.) Pima Cattle Company, a corporation, by three instruments dated April 25, 1966, granted to Inez Mae Pearson, Earnest J. Pearson and Alameda P. Law, and by instrument dated April 20, 1966, granted to Louis C. Pinkham and Dorothy Nichols Pinkham, the perpetual right to transport water through said main irrigation ditch and to use other of its facilities to irrigate the lands in their entries. (Exhibit 29, Exhibit 30, Exhibit 31 and Exhibit 32, respectively.) By instrument dated June 18, 1965, Pima Cattle Company, a corporation, granted all of its right, title

and interest in certain lands, including those covered by the four entries here in question, in trust to Security Title and Trust Company, to secure Kemper Manley in the payment of money advanced or to be advanced by him to the corporation. (Exhibit 34.) Also, by instrument of the same date Pima Cattle Company, a corporation, assigned to Kemper Manley "all rents and sums due and owing" to the corporation "under Lease or Rental agreements now existing or hereafter made, for the leasing or rental" of certain lands including the four entries. (Exhibit 33.)

The above-mentioned irrigation ditch was constructed so that its capacity would be sufficient to irrigate the land in LA-039326 at such time as the ditch was extended to serve the land in that entry. (TR-104 and TR-105.) There has been no cultivation of, nor have any improvements been placed on, the land in that entry. The reclamation of the lands in the remaining three entries is more than adequate to meet the requirements of the desert land laws. (TR-135.)

The Contestees do not deny the existence of the said leases and conveyances. However, they point out that the payments were discontinued on October 11, 1967, after which time the agreements were subject to forfeiture. The documents held for collection by the Bank of America were returned to the entrymen on April 23, 1969. (Exhibit 7.)

The Judge found that the lease option agreements were illegal, void, unlawful, and unenforceable in California, but that McDermott and Pima Cattle Company have a lien against the entries to the extent of their expenditures for improvements. He then concluded that the entrymen had acted in good faith and the existence of the lien satisfied the requirement that they expend funds for the reclamation and cultivation of the entries. Finally

he concluded that the entrymen having rescinded the agreements, the entries could be processed to patent.

Contestant states in its appeal that the subject contests were filed on the basis of and in reliance upon the views expressed in *Solicitor's Opinion Idaho Desert Land Entries—Indian Hill Group*, 72 I.D. 156 (1965), and in Departmental decision *United States v. Shearman*, 73 I.D. 386 (1966). *Shearman* was the subject of judicial review in *Reed v. Hickel*, Civil No. 1-65-86, in the United States District Court for the District of Idaho. Also, *United States v. Hood Corporation*, Civil No. 1-67-97, (hereafter *Hoodco*) was brought in the same Court seeking to cancel patents issued to desert land entrymen on the grounds of fraud against the United States arising from the same transactions as those in *Shearman*. The two actions were consolidated for trial, and by preliminary decision of March 13, 1970, the District Court reversed the Departmental decision and dismissed the complaint in *Hood Corporation*.

The Court of Appeals issued its decision in the two cases on June 4, 1973, as amended on Denial of Rehearing on July 27, 1973, *sub nom. Reed v. Morton, United States v. Hood Corporation*, 480 F. 2d 634 (1973), reversing the District Court and upholding the Department.

The facts in *Shearman* are set out in great detail in the Court and Departmental decisions and need not be restated here. Suffice it to say that

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it involved a plan to develop a large group of desert land entries through the use of entrymen who, having despaired of reclaiming the land on their own, entered into agreements with a corporation which had the exclusive right to possess each entry and to grow and harvest crops on it for a term of 20 years. The entrymen also signed nonrecourse notes secured by first and second mortgages on the entry. Although they did not execute written agreements to sell the entries before or after patent, each reached an agreement with the individual who organized the plan that the entrymen would sell after patent for \$10 per acre. The arrangements between the entrymen, the individual organizer, and the corporation were not revealed to the Bureau of Land Management.

The Department held that the agreement between the entrymen and the corporation was an assignment for the benefit of a corporation within the meaning of the prohibition of section 2 of the Desert Land Act, *supra*; that the combined agreements constituted a holding by the corporation of more than 320 acres of desert land within the meaning of the prohibition of section 7 of the Desert Land Act; that the signing of a nonrecourse note secured only by a mortgage on the entry does not constitute a personal liability for the money expended; and that an entryman must have the intention of reclaiming his entry in accordance with the provisions of

the law at the time the entry is made.

The Court of Appeals canceled the patented entries and affirmed the Department's decision canceling the unpatented entries. It found that the entrymen had given up any interest in the land after they had agreed to transfer their interests to the developers. It also held that, while assignments were permitted under the Desert Land law, secret assignments of entries could not be used to avoid either the proscription against a contract to convey an unpatented entry or against a person or association holding by assignment or otherwise 320 acres and that a corporation could not hold a desert land entry.

[1] We agree with the Administrative Law Judge's conclusion that the agreements were illegal, void, unlawful and unenforceable. As defined in the Department's decision in *United States v. Shearman, supra*, they fall within the scope of prohibited assignments for the benefit of a corporation, of illegal contracts to sell the land in the entries after patents are issued, and of the prohibition against a holding in excess of 320 acres of desert land.

[2] While recognizing the illegality of the agreements and conveyances, the Administrative Law Judge held that the entries could nonetheless pass to patent because the entrymen had acted in good faith and had voluntarily rescinded the agreements, citing *Lois L. Pollard*, A-30226 (May 4, 1965).

There the desert land entrywoman had entered into an executory agreement to sell the land in her entry after she obtained patent. Prior to filing final proof she had refunded the purchase price, and reacquired possession of the entry. She then performed the necessary reclamation and cultivation of the entry. After pointing out that the regulations (then 43 CFR 1964 rev., § 232(17) (b), now 43 CFR § 2521-3(c) (3)), stated that the provisions of law permitting assignments did not furnish authority for a claimant to make an executory contract to convey land after entry and to proceed with the submission of final proof in furtherance of the contract, the Department held that voluntary rescission of an illegal agreement may correct the defect where the entryman executed the agreement in good faith, but that the application of the rule depends on the circumstances of each case.

We hold that the circumstances of this case do not justify a similar application of the doctrine of voluntary rescission.

The Judge points out that the facts in *Hoodco* demonstrate from the very beginning of the entries a much plainer intent to violate the desert land law than can be found here. He stresses the long time the entries were held by the appellants or their predecessors, the discussion of the plan with land office officials, the entrymen's unawareness that the plan was illegal. He then concludes that the entrymen acted in good faith and should benefit from the

Department's policy permitting voluntary rescissions.

He also emphasizes that the entrymen could have financed the development of their entries by mortgages as permitted by the desert land regulation.

While the scenario of *Hoodco* presents, in some ways, a more drastic example of violations of law than the facts herein, a scheme not as outrageous as *Hoodco* may still be not only plainly illegal, as this one was, but may also present circumstances not justifying the application of the doctrine of voluntary rescission. We also note that in *Hoodco* the entryman had only an understanding that they would sell the land to the Hood Corporation and that by paying of the note they could have reclaimed possession of the land. Here the entrymen had specifically agreed to convey the land and could not regain possession before 15 years.

What are the circumstances that militate against granting relief here? First, the life of these entries has run. If rescission is accepted, the entries presumably are ready for patent. There is nothing more to be done. In *Pollard*, to the contrary, the rescission was made during the life of the entry, the money was returned, and Mrs. Pollard proceeded to reclaim the land in accordance with the law. Here there will be no opportunity for the entrymen to demonstrate the sincerity of their repentance by complying themselves with the requirement of the law. The entries will pass to patent sub-

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ject to a huge lien held by Pima who in all likelihood will again have control of these entries. We also note that there is no allegation that they returned any of the money they received from Pima.

Furthermore, one strong element in the rescission cases is whether rescission was made before a contest was brought against the entry. *Blanchard v. Butler*, 37 L.D. 677, 680 (1909). Here there was no attempt at rescission until long after the life of the entry had expired, and after the contest was brought. The rescission, if such there has been, has not been accomplished by any formal document, but only by the return of the instruments to the contestees some 18 months after the contest was instituted.

The concept underlying the doctrine of voluntary rescission is that it permits an innocent person first to undo an illegal act and then to proceed to comply with the requirements of the law. To award patents upon the basis of rescission, alone, coming long after the life of each of the entries has expired, will simply be ratification of the illegal arrangements. The Judge finds that Pima holds a lien on the entries in some undisclosed but substantial amount. While we do not believe that a lien can arise until after patent—at least not one the United States must recognize while the title to the land is in the United States—one presumably would be enforceable after patent. We would then be permitting the parties to accomplish by in-

direction what they could not have achieved directly.

There are other aspects of this case deserving of comment. First, the thought that the entrymen and Pima could have arrived at the same result through the use of mortgages seems to have been accepted by the Judge without question. While a mortgage between one entryman and a lender is sanctioned by the regulation, mortgages by one lender to one or a group of entrymen under which the mortgagee operates and controls the entry for a long period of time, may be "assignments" in violation of section 2 of the Act of March 28, 1908, 43 U.S.C. § 324 (1970), prohibiting assignment to corporations, as well as of section 7 of the Act of March 3, 1891, 43 U.S.C. § 329 (1970), prohibiting holdings in excess of 320 acres. *United States v. Shearman, supra*, 390, 426-428. Pima's rights to and control of the entry are practically identical with those in *Shearman, supra* at 426. Therefore, the substitution of mortgages for lease-options would not have been a magic bullet curing the ills of these arrangements. Pima held 5 desert land entries totaling 880 acres while section 7 permits an individual to hold only 320 acres. Thus Pima still might have been in violation of one or both of the above sections even if mortgages had been used instead of the lease-option.

Again, much is made of the fact that the irrigation system was developed in such a way that each

entry could be individually farmed. Water to serve the entries and some privately owned land was transported from the West Side Main Canal of the Imperial Irrigation District through a concrete lined main irrigation ditch. The concrete ditch was constructed and paid for by Pima. It crossed privately owned lands and then ran along the northern boundary of these entries.

The water must be lifted and transported to the entries by way of the ditch and two pumping plants. Pima owned the pumping equipment. Without the right to use the ditch and pumping equipment there was no way to bring to these entries the water essential to their irrigation. After final proof was filed, the Riverside District and Land Office called these circumstances to the entrymen's attention and required them to submit proof that each had a permanent and legal right to use these facilities.

The entrymen, thereupon, filed evidence showing that by instruments dated April 25, 1966, or April 20, 1966, Pima Corporation granted to them the perpetual right to transport water through the main irrigation ditch and to use its other facilities to irrigate the land in their entries.

Up to this point, then, Pima had a stranglehold on all the entries. Simply by refusing an entryman permission to use the ditch or pumping facilities, it could have made it impossible for him to irrigate his entry. How could an entryman assume any financial responsibility for

the cost of the ditch, as we are urged to believe each one did, when he had no assurance that the ditch would be of any value to him? On the other hand, if Pima not only acquired control of the entries at the outset of the arrangement but intended to keep control at all times, then one and the same person had control of the entries, the ditch and the pumping facilities. So long as all these interests were in Pima it did not have to grant a right-of-way to the entryman of record. It already had it all. It is difficult to believe that even the most naive of entrymen would not have recognized the peril inherent in such an arrangement. The only plausible explanation is that each entryman had no intention of assuming any financial responsibility for the cost of the irrigation facilities and never expected to regain control of his entry.

Other aspects of the arrangement point to the same conclusion. Pima had complete control of the entry for the 15-year term. The entrymen had no obligations except to deliver a deed to the escrow agent for delivery to Pima at the expiration of the term or sooner if mutually agreeable. The agreement provided that if the lessees failed to perform, "any payments made by the Lessees will be kept by the Lessor as liquidated damages." Rental payments under a lease are earned when due and are not liquidated damages in the event of a breach of contract by a lessee. The payments, therefore, are not rental payments but are part of the consideration to be paid for

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the purchase of the land. Thus the arrangement establishes that the entrymen intended to convey the land when they entered into the lease-option agreements.

Next, after the lease-option agreement had been signed, the entrymen pointed out to the lessee that the purchase price was \$8,000 instead of the \$4,800 set out in the agreements. Again this bespeaks a concern much more relevant to a sale than a lease.

Nor are the substantial sums invested by Pima sufficient reason to permit an erosion of the desert land law. As the Court said in *Hoodco*, *supra*:

We cannot escape the conclusion that the district court gave undue weight to the substantial investment of Hoodco in developing the lands. *Id.* at 639.

* * * * *

But secret "arrangements" and "understandings," like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty. However quixotic it may seem at this late date to say so, Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders. *Id.* at 641-42.

Finally, none of the rescission cases involve facts such as we have here. They have been concerned with an individual entryman dealing with an individual "purchaser." Here we have not only a plain violation of the law, but a violation involving one purchase and at least five entries.

In view of the circumstances of

this case, the doctrine of voluntary rescission is not to be used to permit the disregard of so many provisions of the desert land law.

There remain two other charges which, while related to the arrangement with Kemper and Marley and Pima, deserve some separate comment.

Charge (d) alleges that the entrymen did not expend the amount of money required by law in the necessary irrigation, reclamation, and cultivation of their respective entries. The Judge, while dismissing this charge, did not find that the entrymen expended their own funds or incurred a personal obligation for expenditures made by others. He held that expenditures made by McDermott, Manley, *et al.*, created a lien by operation of law against the entries and the obligation of the lien is sufficient to satisfy the requirement of the desert land law. The imposition of a lien against this land would not make the entrymen responsible for the debt in any other way. The lien, assuming that there is one, runs only against the land in the entry. The entrymen incurred no other obligation. The entrymen then are in the same position as though they had borrowed money from Pima secured only by mortgages on the entries, so that the notes were not their personal obligations.

This was exactly the situation in *United States v. Shearman*, *supra*. There all of the cost of development was paid by Hoodco. The notes and mortgages expressly provided that

the entrymen should have no personal liability and that the only recourse of the holders of the notes in the event of default would be to foreclose upon the lands in the respective entries.

The Department concluded that each of the entrymen had failed to expend \$3 per acre for the irrigation, reclamation, and cultivation of his entry. 73 I.D. at 388, 389. It held:

In order to comply with the requirements of section 2 of the act of March 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended. *Syllabus* at 386.

The Chief Hearing Examiner's decision, which was published as an appendix to the decision, concluded that expenditures made by others than the entryman which impose no personal liability on him do not satisfy the statutory requirement. *Id.* at 428-32. The Solicitor had reached the same conclusion and set out his reasoning in full in a memorandum to the Secretary reporting on the legality of the entries involved in *Reed v. Morton, supra, Idaho Desert Land Entries*, 72 I.D. 156, 168-72 (1965).

The Circuit Court noted that the entrymen had not incurred any personal obligations, but drew no particular conclusions from that circumstance. Since it held that a formal contract or the existence of an understanding that title to the land would pass after patent required the cancellation of the patents already issued and of the en-

tries still outstanding, it did not find it necessary to consider this other ground which would only have supported the same result.

In the instant case, the entrymen neither expended their own funds nor incurred any personal liability under the lease-option agreements. Even if a lien is found to have replaced the lease-option agreement, the entrymen still have neither expended their own funds nor incurred a personal liability for the expenditures for the reclamation of the entries.

Accordingly, for this reason alone, the entries must be canceled.

Charge (f) alleged that:

The entrymen have not maintained the entries in good faith with intent to irrigate, reclaim and cultivate the land therein as required by Section 1, Act of March 3, 1877 (*supra*).

The Administrative Law Judge held that good faith is shown if the entryman brings unproductive desert land into production, and his methods and motives are not to be examined in order to determine his good faith. The Judge held that the lease-option agreements, while illegal, do not amount to a demonstration of lack of good faith because they were a substitute for mortgage financing permitted by the regulation, and were adopted on advice of counsel with the knowledge of the Bureau of Land Management.

The concept that an entryman's motives and methods are not to be examined so long as his purpose is to bring desert land into production and to make money is startling.

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While these goals are legitimate, they are not enough to establish an entryman's "good faith." He must proceed by means sanctioned by the desert land law.

At no time did the appellants intend to assume any personal liability for the huge expenses necessary to reclaim, irrigate and cultivate the land. During the last year of the entry's statutory life and long thereafter the entries were subject to the illegal lease-option agreements. However innocently the entrymen may have entered into the agreements, they never had the intention of reclaiming the lands themselves. Without such an intention, they cannot have maintained their entries in good faith. *United States v. Shearman, supra* at 388, 389, 414-25.

Accordingly for this reason, too, the entries should be canceled.

[2] We now consider contestee Inez Mae Pearson's⁴ appeal. After having noted that there had been no cultivation of, nor had any improvements been placed on, the land in that entry, the Judge expressed no opinion on the statutory life remaining in entry LA 039326 embracing the E 1/2 sec. 35, T. 15 S., R. 11 E.

Mrs. Pearson pleads that she be allowed 19 months in which to complete the reclamation of her entry, contending that delays in completing the work were not of her own making but were caused by the actions of officials of the Department

of the Interior. The combination of facts and assertions prompting this plea follow.

In constructing the irrigation system to serve the lands in the subject entries as well as other lands in the vicinity, Pima Cattle Company extended the irrigation ditch northward with the intention of carrying water to the E 1/2 sec. 35. However, construction was stopped at a point one-half mile from that land in 1964 when an official of the Riverside office advised McDermott not to do any further work on the land until further advised by that office because of a decision by the Riverside district and land office on September 10, 1964, which declared null and void a 1959 decision of the Los Angeles land office, which had recognized an assignment of the entry to Mrs. Pearson from her mother, on the ground that the entry had expired before the assignment was made. On appeal to the Secretary, the Department reversed and remanded the case for further action. *Inez Mae Moore Pearson, A-30507* (March 31, 1966).

The Department held that the entry still had 19 months of statutory life remaining on December 2, 1965, the date on which notices that the suspension was revoked were sent to the affected entrymen whose entries were suspended under *Havens, supra*. Nevertheless, in view of the pending interim status of the case, as an equitable matter, the Department held that Mrs. Pearson's period would run from the date of its decision. The decision concluded,

⁴ Now deceased.

among various alternatives, with the following:

* * * or if she was in the process of reclaiming her entry on December 2, 1965, but had not completed reclamation she will be given the remaining life of her entry, i.e., 19 months, to complete her reclamation and submit notice thereof, but she must within 90 days of this decision give notice of her election to take such greater period. * * *

Within 90 days of the March 1966 decision, specifically on June 16, 1966, Inez Mae Pearson filed with the Riverside district and land office her election to take the period of 19 months within which to complete reclamation of the entry. She stated that the structures would be completed for serving said land and crops would be grown thereon within the period of 19 months. The Riverside office transmitted the case file to the Regional Solicitor, Department of the Interior, Los Angeles, for recommendations in July 1966. During the period of time the case was in the Regional Solicitor's office, the Department's decision in *Shearman* was issued, as a result of which that office concluded that the entry should be contested. The contest complaints were issued on December 20, 1967.

We find that the life of Mrs. Pearson's entry expired 19 months from the date of the March 31, 1966, decision, or on October 31, 1967; and that under the Secretary's instructions of December 2, 1965, terminating the *Havens'* suspension, no fur-

ther extensions are warranted. A pending contest does not excuse an entryman from further performance looking toward perfection of the entry. This case is comparable to *Killen v. Davidson*, A-28871 (August 8, 1962), in which the Department stated:

There is, of course, no basis for the contestee's contention that he was, or should have been, excused from compliance with the requirements of the homestead law while the entry was under contest. The 5-year life of a homestead is fixed by statute (43 U.S.C., 1958 ed., sec. 164) and no officer or employee of the Department of the Interior has authority to extend it. The fact that a land office employee may have suggested to a homestead entryman during the second year of the entry that it would be wise to postpone extensive improvement of the entry pending the outcome of a contest is not a promise that the entryman may rely upon the contest to excuse all further performance looking toward perfection of the entry in complete disregard of the statutory limitation on the life of the entry. Of course, such employee could not grant to the entryman any right in public land not authorized by law. *Orvil Ray Mickelberry*, A-28432 (November 16, 1970); *Gerald C. Chisum*, A-28295 (June 7, 1960). * * *

Accordingly, we hold that the statutory life of Inez Mae Pearson's entry LA039326 embracing the E 1/2 sec. 35, T. 15 S., R. 11 E., has expired, and the entry is canceled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is modified as to

entry 039326 and reversed as to the others.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

ADMINISTRATIVE JUDGE
ANNE POINDEXTER LEWIS
DISSENTING:

For the reasons stated below I disagree with the finding of the majority that the desert land entries of Alameda P. Law, Earnest J. Pearson, and Dorothy Nichols Pinkham should be canceled and I would find, in agreement with the Administrative Law Judge herein,¹ that contestant's complaints with respect to these entries should be dismissed.

Thus, according to Judge Steiner,

The principal basis for the Contestant's allegations of lack of good faith is the interest and activity of the Pima Cattle Company. The Contestees contend that they entered into the agreements in order

to obtain financing without which improvements could not have been made. At all times the Bureau of Land Management was advised that McDermott, Manley and Pima Cattle Company were actively engaged in developing the entries. Nowhere in the record is there any evidence that the Contestees attempted to conceal their relationship with McDermott. The entrymen and McDermott could have arranged the necessary financing through the use of mortgages as authorized by Departmental regulations (see 43 C.F.R. 2226.1-3(d)). Under those circumstances, McDermott could have proceeded with the actual development work in the same manner as has been done. The mortgages could have been executed in amounts which would have amply provided for all costs. * * *

The entrymen were apparently acting under advice of counsel. They did not know that their agreements could possibly result in the cancellation of the entries, and were not so informed by the Bureau of Land Management [although BLM at all times was kept informed of contestees' actions].

When they became aware that the entries could not be so assigned, payments on the leases were terminated. Nowhere in the record is there any evidence, or even an inference, that the Pima Cattle Company, or its agents in any way "promoted" the entries as was done in the Shearman case. It is clear that these lands were brought under cultivation in good faith.

As to the legal effect of the lease-option agreements in California, Judge Steiner found them illegal, void, and unenforceable, under the authority of *Griffis v. Squire*, 276 CA 2d 461 (1968), 73 Cal. Rptr. 154. He further found that the agreements, having been executed in good faith, do not preclude the processing of the entries to patent, under the

¹ I adopt as part of this dissent the quoted portions of his decision.

principle of *Lois L. Pollard*, A-30226 (May 4, 1965).²

Judge Steiner further found:

Title 43 U.S.C. sec. 328, relating to expenditures and cultivation, provides, in part, as follows:

"No land shall be patented to any person under this chapter unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent

² With respect to the Pollard case, Judge Steiner writes:

In *Lois L. Pollard* A-30226 (May 4, 1965), the entrywomen had entered into an executory agreement to convey land in the entry after patent, but, prior to filing final proof, had refunded the purchase price and regained possession through cancellation of the agreement for breach of contract by civil litigation. It was held that "voluntary rescission of an illegal agreement is recognized where the entrymen executed the agreement in good faith." (Citing *Blanchard v. Butler*, 37 L.D. 677 (1909); *George F. Bisler*, 40 L.D. 79 (1911); *Martin L. Torres*, 51 L.D. 247 (1925). In remanding the matter for review of the entrywoman's good faith, the Solicitor stated:

"If Mrs. Pollard had entered into the agreement in good faith and had then ascertained or been informed that the agreement was invalid and had voluntarily rescinded it, she presumably would have been allowed to process her entry to patent. The question here is whether if, in good faith, believing the agreement binding, she has it set aside on other grounds through litigation, a different rule should apply. We think not.

"As indicated earlier, however, the benefits of voluntary rescission extend only to an entryman who entered into the forbidden agreement without intent to violate the law. Mrs. Pollard states that the parties did not intend to violate the Departmental regulation and had no idea that the agreement was improper. While this is only her statement, nothing in the present record affords any basis for questioning her statement. If, upon return of this case to the Bureau, it believes, through investigation or otherwise, that Mrs. Pollard knowingly violated the regulation, a contest should be brought against the entry and a hearing held to establish the facts. If the Bureau has no reason to challenge Mrs. Pollard's assertions of good faith, her final proof should be processed in accordance with the usual procedure."

improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least \$3 per acre of whole tract reclaimed * * *."

The Contestant takes the position that the statute requires the expenditure of personal funds for reclamation or the incurrence of personal liability therefor. The Contestant does not deny that several hundred thousand dollars has been so expended while the law requires an expenditure of only three dollars per acre for a total on the entries of approximately two thousand, one hundred and sixty dollars. The difficulty is that the bulk of the expenditures were made by the lessee.

As stated hereinabove, under California law, the Pima Cattle Company is entitled to a lien against the entries to the extent of its expenditures for reclamation and cultivation. The entrymen have incurred liability for those expenditures. Therefore, they have complied with the expenditure requirements of the Desert Land Act.

In holding that these three entries should be canceled, the majority relies entirely on the Court of Appeals' decision handed down in the so-called "Indian Hill" cases while the instant case was pending before this Board.³ We do not agree that the instant case is governed by this decision in the Indian Hill cases as the facts are readily distinguishable.

The Court there held that the Indian Hill patents and entries must be canceled because there was an understanding between the entrymen and the developers that title to the lands would pass after patent, which understanding was not revealed by the parties. The Indian

³ *Reed v. Morton, United States v. Hood Corporation*, 480 F. 2d 634 (1973).

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Hill entries were clearly a fraud against the United States. In early 1961, Reed and a Raymond Michener recruited friends and relatives who, with Reed and Raymond Michener, filed twelve desert land entries. Reed and Michener at the same time purchased from the State of Idaho a section of state-owned land contiguous with parts of the twelve tracts for which the desert land applications had been filed, a total of 3,700 acres. Hoping to develop the lands, Reed and Michener organized a non-profit corporation known as Indian Hill Irrigation Company, and assumed the titles of officers of the corporation. There was no election of officers, shareholders' meeting, or payment for subscribed stock.

Reed and Michener had difficulty obtaining capital. On February 12, 1963, they called a meeting of the entrymen and informed them that because of a shortage of capital caused by the failure of anticipated loans to materialize each entryman would either have to pay to Reed and Michener \$983 dollars in cash and assume a personal obligation of between \$12,000 and \$14,000, or sign a long-term lease with, and turn over development of the project to, Indian Hill Irrigation Company. All of the entrymen except Reed and Michener then entered into a twenty-year "lease and development contract" with Indian Hill, and signed notes and mortgages for \$300 per acre payable on demand to secure the payments that would fall due under the lease. These notes

were secured only by the mortgages on the entry lands, and were not the personal obligations of the entrymen. Indian Hill agreed to bear all expenses and retain all profits. By agreement in 1965, Hoodco Farms, Inc. took over development of the project from Reed and Michener.

After the February 12, 1963, meeting, the entrymen themselves did not behave as if they had any interest in the lands. On August 15, 1963, they signed without discussion or dissent agreements which made it practically impossible for them ever to regain possession of the lands. They received no copies of the documents which they had signed, in most cases, without reading them. They did not protest when Hoodco Farms developed the land in such a way that it could not be farmed in individual units. They exhibited no curiosity when, upon issuance, the patents were delivered to and recorded by Hoodco Farms, although the patentees were the ostensible titleholders. At the time of the final "sale" the patentees entered into no meaningful negotiations with the purchasers. In other words, the entrymen, with the exception of Reed and Michener, were merely straw men, and the transactions in the case were clearly in violation of the Desert Land Law.

On the other hand the entries involved in the case at hand were made many years ago by predecessors in interest of the present entrymen. The entrymen and their predecessors have spent many years in trying to bring water to their lands.

The entries were not made at the behest of promoters as was done in the Indian Hill cases. The agreements with McDermott, Marley, and Pima Cattle Company were entered into in good faith by the entrymen, and without knowledge by them that the agreements could possibly result in the cancellation of the entries. The parties did not attempt to conceal the agreements but instead discussed them on various occasions with officials of the Los Angeles and Riverside offices of the Bureau of Land Management. There is no evidence whatsoever of any intent by these entrymen to violate the law. Furthermore, these entries have been developed so that each one can be farmed as an individual unit, in marked contrast to the irrigation system on the Indian Hill entries, which was constructed so that none of the entries could be farmed individually.

In conclusion, we would hold that the Judge was correct in dismissing the contestant's complaints against the three improved and cultivated entries.

ANNE POINDEXTER LEWIS,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I find much with which I can agree in both the majority opinion and in the dissent of Judge Lewis, and the correct result seems to me to be a very close question.

However, I depart from the majority view in one major particular

and several minor ones. Foremost among my concerns is the heavy reliance of the majority on the holding in *Reed v. Morton, United States v. Hood Corporation*, 480 F. 2d 634 (9th Cir. 1973). There, the Court of Appeals reversed the District Court upon the appellate court's finding that where there was an illegal arrangement which had been kept secret from concerned officials of the United States by the suppression of facts which, if known to such officials would have made impossible the acquisition of the land, saying, at p. 641:

But secret "arrangements" and "understandings," like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty. * * *

In the present case there was an understanding that title to the lands would pass after patent, and that understanding was not revealed by the claimants. Because "the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible," the patents and entries must be canceled. * * *

The Court of Appeals found that such behavior by the entrymen and those who contracted with them was almost conclusive evidence of fraud against the Government, and it was on this basis that the Court held as it did.

By contrast, in the case at bar there is no evidence whatever of any deliberate fraud or any concealment of material facts from concerned of-

ficials of the Bureau of Land Management. On the contrary, the parties discussed their agreements on various occasions with BLM officials, who apparently did nothing to suggest to the parties that their arrangements were illegal. That they were illegal is now established beyond dispute, but I am convinced that the parties did not know this, and that they were acting in absolute good faith. Accordingly, I am not assured that the Court of Appeals would reach the same result in this case as it reached in *Reed v. Morton*, *supra*.

The rescission of the agreement occurred when the parties finally came to the realization that it was illegal. This adequately accounts for the timing of the rescission, which seems a matter of considerable concern to the majority. In my view, the fact that the agreement was nullified after the expiration of the term of the entries, rather than before, is of no great significance.

Finally, the majority concludes that one of the circumstances which militate against granting relief in this case is that, "The entries will pass to patent subject to a huge lien held by Pima who in all likelihood will again have control of these entries." I submit that this is not only unwarranted and conjectural, but that it is none of the business of this Board. It is not shown that the

of the land, so that the entrymen "huge" lien is in excess of the value would be moved to default rather than retire the lien. Nothing is known to the Board concerning the financial standing or credit of the entrymen. Moreover, by 43 CFR 2521.4(d), a desert-land entryman may mortgage his interest in the entered land if the State law treats such a mortgage as a lien against the entered lands rather than a conveyance thereof. Were this a perfectly ordinary case involving such a mortgage lien, this Department would not and could not refuse the patent merely out of concern that the entryman might not pay off the balance owing on the mortgage, and thereby lose title after the patent issued. Yet that is one of the concerns of the majority in this case.

I would, after some hesitation, affirm the decision of the Administrative Law Judge, with a modification of his decision to the effect that the statutory life of Inez Mae Pearson's entry, LA039326, expired 19 months after the Departmental decision styled *Mrs. Inez Mae Moore Pearson*, A-30507 (March 31, 1966). The basis for that modification may be found in the rationale of *Killen v. Davidson*, A-28871 (August 8, 1962), and in this I concur with the majority.

EDWARD W. STUEBING,
Administrative Judge.

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(Note—See front of this volume for tables)

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Where filing fees for adverse claims against mineral patent applications are tendered timely to the appropriate Bureau of Land Management office, and such office erroneously refuses to receive such payment, and accepts payment therefor one day later upon recognition of its error, the payment may be properly regarded as having been made as of the date of tender thereof..... Page 619

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strained by the Act of June 25, 1910, 25 U.S.C. § 337 (1970), to accept the finding of the Department of Agriculture that the lands applied for are not more valuable for agricultural or grazing purposes than for the timber found thereon. Such a finding dictates rejection of the application by this Department.

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ACT OF JULY 15, 1921

Where the United States disposes of public lands with a reservation of minerals to the United States, the reserved minerals are not subject to location under the general mining laws in the absence of specific statutory authority. Minerals reserved to the United States in a patent to the City of Phoenix issued pursuant to the Act of July 15, 1921, 42 Stat. 143, are subject to the mining laws, as neither that Act nor any other statute provides for disposition of the reserved minerals under the mining laws.

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To deny a legislative determination of village eligibility because of a delay caused by the very magnitude of the problem that Congress felt necessary to confront would be contrary to the essence of the settlement itself.

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ity of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Valid millsite claims situated within the recreation area may not go to patent, but such result does not prevent or interfere with the full exercise of a claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located.

15

ADMINISTRATIVE AUTHORITY

(See also Federal Employees and Officers.)

GENERALLY

Where an asserted adverse claim is filed timely against a mineral patent application, and suit is commenced timely in a court of competent jurisdiction, the Department is not obligated to decide whether the asserted adverse claim is a proper claim within the ambit of 30 U.S.C. §§ 29, 30 (1970), but may suspend action on the mineral patent application to await the result of the judicial proceedings.

619

ESTOPPEL

Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind

ADMINISTRATIVE AUTHORITY—
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Reliance on erroneous notations in federal and county land records can neither serve to divest the United States of title to land, nor estop the United States from denying that title passed or from concluding that a patent cannot be amended to include certain land.....	534

ADMINISTRATIVE PRACTICE

Executive orders have the force and effect of law and rules of statutory construction apply to them...	65
There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to nonmetalliferous loca-	

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tion under the mining laws.....	Page 65
Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application.....	262
In the exercise of its delegated authority pursuant to 43 CFR 4.1, the Interior Board of Land Appeals need not limit its review to a narrow issue where to do so would preserve error or inequity.....	401
Where an asserted adverse claim is filed timely against a mineral patent application, and suit is commenced timely in a court of competent jurisdiction, the Department is not obligated to decide whether the asserted adverse claim is a proper claim within the ambit of 30 U.S.C. §§ 29, 30 (1970), but may suspend action on the mineral patent application to await the result of the judicial proceedings.....	619

ADMINISTRATIVE PROCEDURE

(See also Appeals, Contests and Protests, Hearings, Rules of Practice.)

GENERALLY

Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. §38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue..... Page 687

ADJUDICATION

The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit... 65

The Department of the Interior has jurisdiction to determine if a mining claim is invalid by being located on land not subject to mineral location, even where the issue of validity of the claim is raised in the context of a private contest brought by a surface patentee..... 65

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act and the due process requirements of the Constitution..... 83

The fact that a hearing in a mining contest is conducted by an Adminis-

ADMINISTRATIVE PROCEDURE—Continued**ADJUDICATION—Continued** Page

trative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient. 83

ADMINISTRATIVE PROCEDURE ACT

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department..... 188

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The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit..... 65

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a

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qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act and the due process requirements of the Constitution.....

83

The fact that a hearing in a mining contest is conducted by an Administrative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient....

83

There is no right under the seventh amendment of the Constitution to a jury trial in an administrative hearing on a mining contest, as that amendment does not apply to quasi-judicial administrative proceedings.....

83

PUBLIC INFORMATION

The resolution of claims of privilege requires an adjustment of the divergent interests involved on an *ad hoc* basis; accordingly, the Board finds that documents furnished a contracting officer by

ADMINISTRATIVE PROCEDURE—
Continued

PUBLIC INFORMATION—Con.

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Government personnel regarding a claim filed for an equitable adjustment are not entitled to be withheld on the ground that they are internal advisory memoranda prepared in contemplation of litigation since, on balance, they relate only to factual matters and, having been furnished the contracting officer prior to issuance of his decision, are not considered to have been prepared in anticipation of litigation. Documents consisting of calculations and drafts of proposed findings of fact are considered to bear upon the metal processes, deliberations, computations and methods by which the contracting officer arrived at his decision and are privileged.....

157

ALASKA

HOMESTEADS

Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described including the homestead land; as to the homestead land the withdrawal becomes effective *eo instanti* upon termination of the homestead entry.....

150

A notice of location filed pursuant to the homestead laws but embracing land covered by a withdrawal

ALASKA—Continued**HOMESTEADS—Continued**

is unacceptable for re-
cordation-----

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150

TRADE AND MANUFACTURING SITES

Land is not occupied under 43
U.S.C. § 687(a) (1970)
and 43 CFR 2562.3(d)(1)
by use of the air space
over it for the trajectory
of bullets-----

631

Under 43 U.S.C. § 687(a) (1970)
and 43 CFR 2562.3(d)(1),
where there is no dispute
as to the facts, the *pro*
tanto rejection of an ap-
plication to purchase a
trade and manufacturing
site will be affirmed to
the extent that the ap-
plication includes a large
peripheral safety zone in
connection with a rifle
range and an archery
range, and fails to show
substantial improvements
on, or active use of the
rejected area-----

631

**ALASKA NATIVE CLAIMS SET-
TLEMENT ACT****GENERALLY**

Where land included in a home-
stead entry of record is
included among lands
withdrawn "subject to
valid existing rights,"
the withdrawal attaches,
as of the date of the with-
drawal, to all land de-
scribed including the
homestead land; as to the
homestead land the with-
drawal becomes effective
eo instanti upon termina-
tion of the homestead
entry-----

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A notice of location filed pur-
suant to the homestead
laws but embracing land
covered by a withdrawal
is unacceptable for re-
cordation-----

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APPEALS

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(See also Contracts, Federal Coal
Mine Health and Safety Act of
1969, Grazing Permits and Li-
censes Indian Probate, Indian
Tribes, Rules of Practice, Uni-
form Relocation Assistance
and Real Property Acquisition
Policies.)

Where an appellant serves ap-
pellee, rather than appel-
lee's counsel of record,
with the notice of appeal
and statement of reasons,
and it appears that ap-
pellee's response to those
documents reflects a full
understanding of the
crucial issues involved,
summary dismissal of the
appeal under 43 CFR
4.402 need not be in-
voked, and will not be
invoked in appropriate
situations-----

619

Where the evidence adduced at
the hearing of the contest
of the validity of a mining
claim is inadequate to
establish whether the
claimants have earned
the right to receive a
patent pursuant to 30
U.S.C. § 38 (1970), the
case will be remanded for
the taking of further evi-
dence and the rendering
of a decision limited to
that issue-----

687

APPLICATIONS AND ENTRIES**GENERALLY**

By regulation the filing of a
formal exchange applica-
tion under the Taylor
Grazing Act, 43 U.S.C.
§ 315g(b) (1970), segre-
gates the selected land
from appropriation under
the mining laws. A mining
claim located on such land
thereafter is void *ab initio*
and affords no basis for a

APPLICATIONS AND ENTRIES—

Continued

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protest against the exchange-----	188
The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands-----	188
A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected-----	340
Pursuant to a regulation, applications to acquire a right-of-way for the main purpose of irrigation should be made under the Act of March 3, 1891-----	340

AMENDMENTS

In the absence of proof of a general administrative practice to notify claimants who filed notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown sufficient to overcome the

APPLICATIONS AND ENTRIES—

Continued

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presumption of administrative regularity, and sufficient to warrant an amendment of the patent.	534
An application for amendment of patent by the successors of an Oregon Donation Claim patentee is properly rejected when the applicants request patent to land to which the original settler was not entitled because it would have exceeded his statutory entitlement---	534
RELINQUISHMENT	
In the absence of proof of a general administrative practice to notify claimants who filed notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown sufficient to overcome the presumption of administrative regularity, and sufficient to warrant an amendment of the patent-----	534

APPROPRIATIONS

The Government's motion to dismiss for lack of jurisdiction a claim asserted under the changes clause of a construction contract was denied where the funding schedule adopted by the contracting agency increased the time required for performance, altered the approved construction program and led to a cessation of work for

APPROPRIATIONS—Continued

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lack of funds; the contingency provisions of the Funds Available for Earnings Clause were not involved when Congress appropriated funds in the amount deemed necessary and requested by the contracting agency and Congress was not the source of the fund shortage; the Government's assertion that the fund shortage was a breach of contract over which the Board has no jurisdiction was erroneously based on cases wherein Congress had reduced or failed to appropriate the funds requested of it-----

354

BOUNDARIES

(See also Surveys of Public Lands.)

A meander line is not a line of boundary, although it may be given that effect by a withdrawal, exception, reservation or relinquishment of lands which border thereon-----

300

COAL LEASES AND PERMITS**LEASES**

Under 43 CFR 3524.2-1, an application to modify a coal lease without competitive bidding, to include contiguous coal deposits, will be denied if it is determined and not controverted that the additional lands requested can be developed as part of an independent operation or that there is a competitive interest in them-----

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CONFIDENTIAL INFORMATION

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(See also Administrative Procedure: Public Information.)

The resolution of claims of privilege requires an adjustment of the divergent interests involved on an *ad hoc* basis; accordingly, the Board finds that documents furnished a contracting officer by Government personnel regarding a claim filed for an equitable adjustment are not entitled to be withheld on the ground that they are internal advisory memoranda prepared in contemplation of litigation since, on balance, they relate only to factual matters and, having been furnished the contracting officer prior to issuance of his decision, are not considered to have been prepared in anticipation of litigation. Documents consisting of calculations and drafts of proposed findings of fact are considered to bear upon the mental processes, deliberations, computations and methods by which the contracting officer arrived at his decision and are privileged-----

157

CONSTITUTIONAL LAW**GENERALLY**

The fact that a hearing in a mining contest is conducted by an Administrative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate

CONSTITUTIONAL LAW—Con.

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review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient-----

83

There is no right under the seventh amendment of the Constitution to a jury trial in an administrative hearing on a mining contest, as that amendment does not apply to quasi-judicial administrative proceedings-----

83

DUE PROCESS

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded, comply with the Administrative Procedure Act and the due process requirements of the Constitution-----

83

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department-----

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CONTESTS AND PROTESTS

(See also Rules of Practice.)

GENERALLY

Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. § 38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue-----

687

An applicant whose desert land entry, suspended for many years by the decision in *Maggie L. Havens* and who was allowed the 19 months provided by the Secretary's notice of Dec. 2, 1965, to submit proof of compliance with the requirements of the Desert Land Act, is not to be given further time when the evidence adduced in a contest against the entry shows that compliance with the cultivation and reclamation requirements of the desert land law was not accomplished within the life of the entry; the existence of a contest against the entry does not suspend the entry while the contest is pending and thus permit compliance with the requirements for perfection of the entry beyond the statutory life of the entry-----

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CONTRACTS

(See also Rules of Practice.)

GENERALLY

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Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application..... 262

CONSTRUCTION AND OPERATION**GENERALLY**

In construing contracts, "including" is a word of enlargement used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specially mentioned..... 447

Where a sentence in an oil and gas unit agreement prescribing a royalty rate is grammatically correct and as set out has a reasonable interpretation, its punctuation will not be changed..... 447

In construing contracts, restrictive words normally apply only to the nearest antecedent..... 447

The doctrine of practical construction does not apply unless an agreement is ambiguous..... 447

An oil and gas unit agreement, as other agreements, is not ambiguous merely

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because the parties disagree as to its meaning if the disagreement is not based on the reasonable uncertainty of the meaning of the language..... 447

Actions of Parties

A changes claim is denied where the appellant contends that the representatives of the contracting officer improperly failed to issue instructions for the removal of unstable foundation material at specified locations and for its replacement with gravel filter material but the evidence indicates that the failure of the Government representatives to issue such instructions was simply a recognition by them that it was within the contractor's prerogative to determine the methods and equipment to be utilized in performing the contract..... 580

Changed Conditions (Differing Site Conditions)

No basis exists for finding either category of changed conditions where the subsurface data furnished by the Government accurately portrays the subsurface conditions actually encountered by the contractor at the site of the work..... 580

Changes and Extras

Where a contract for the construction of two power lines provided that the Government had placed a center hub at each tower

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Changes and Extras—Con.

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location but that the contractor was to check stationing, alignment and elevation of each center hub and to replace missing or destroyed center hubs, the Board rejected the contractor's contention that the fact some of the hubs were missing made the specifications defective since the contract contemplated that some of the hubs might be missing. Although the contractor failed to give the notice required by paragraph (b) of the Changes clause or paragraph (c) of the Suspension of Work clause, the Board, under the circumstances present here, considered the claim for a constructive change for suspension of work while the Government replaced the missing hubs on the merits, holding that the contractor's failure to assert the claim at an earlier time was a factor to be considered in determining whether the contractor had satisfied its burden of proof.

114

Where a road was not in the location specified by the drawings and the Government relocated two of the towers in order to avoid difficulties and expenses associated with having the legs of one of the towers located on the slope of a cut through which the road had been constructed, the Board holds that the specifications were defective and

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Changes and Extras—Con.

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that the contractor was entitled to an equitable adjustment for all costs incurred in attempting to perform under such specifications in accordance with the Changes clause. Claims involving defective specifications are recognized exceptions from the notice requirements of the Changes clause and need only be asserted within a reasonable time and before final payment.

114

A contractor's claim for an equitable adjustment for costs incurred in allegedly accelerating performance of the work was denied where appellant failed to establish that the costs claimed resulted from the denial of proper requests for time extensions, rather than from a belated attempt to overcome the effects of inclement weather, insufficient and inadequate equipment, etc., for which the Government was not responsible.

115

The Government's motion to dismiss for lack of jurisdiction a claim asserted under the changes clause of a construction contract was denied where the funding schedule adopted by the contracting agency increased the time required for performance, altered the approved construction program and led to a cessation of work for lack of funds; the contingency provisions of

CONTRACTS—Continued
CONSTRUCTION AND OPERA-
TION—Continued

Changes and Extras—Con.

the Funds Available for Earnings Clause were not involved when Congress appropriated funds in the amount deemed necessary and requested by the contracting agency and Congress was not the source of the fund shortage; the Government's assertion that the fund shortage was a breach of contract over which the Board has no jurisdiction was erroneously based on cases wherein Congress had reduced or failed to appropriate the funds requested of it.-----

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354

A changes claim is denied where the appellant contends that the representatives of the contracting officer improperly failed to issue instructions for the removal of unstable foundation material at specified locations and for its replacement with gravel filter material but the evidence indicates that the failure of the Government representatives to issue such instructions was simply a recognition by them that it was within the contractor's prerogative to determine the methods and equipment to be utilized in performing the contract.

580

Where under a contract for a printing press a contractor is required to furnish a device known as a punch in order to meet its alleged contractual obligation and where the

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CONSTRUCTION AND OPERA-
TION—Continued

Changes and Extras—Con.

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evidence of record shows that the punch was listed as an optional item of equipment in the descriptive literature accompanying the bid upon which the contract was based, the Board determines the contract price should be equitably adjusted to reflect the furnishing of the punch.---

663

Contract Clauses

Where, in the course of installing and connecting new sand filter units with existing units under a contract to modify a water system, which provided that no separate payment would be made for pipe and fittings included with the filter units, but pipe and fittings required for connecting the units to existing piping would be paid for at unit prices, a contractor's claim for furnishing certain piping and fittings, which the Government had denied on the ground that its cost should have been included as part of the filter units, was upheld and the contractor was entitled to be paid therefor at unit prices since the material was installed beyond the limits of the new filter units and was thus connecting piping. The contractor's interpretation, which reconciled the specifications and drawings, was reasonable; since a latent ambiguity was present the contractor was not required

CONTRACTS—Continued
CONSTRUCTION AND OPERA-
TION—Continued

Contract Clauses—Continued Page

to seek clarification of
any and all doubts or
possible differences in in-
terpretation----- 759

Drawings and Specifications

Where a contract for the con-
struction of two power
lines provided that the
Government had placed a
center hub at each tower
location but that the
contractor was to check
stationing, alignment and
elevation of each center
hub and to replace miss-
ing or destroyed center
hubs, the Board rejected
the contractor's conten-
tion that the fact some
of the hubs were missing
made the specifications
defective since the con-
tract contemplated that
some of the hubs might
be missing. Although the
contractor failed to give
the notice required by
paragraph (b) of the
Changes clause or para-
graph (c) of the Suspen-
sion of Work clause, the
Board, under the circum-
stances present here, con-
sidered the claim for a
constructive change or
suspension of work while
the Government replaced
the missing hubs on the
merits, holding that the
contractor's failure to
assert the claim at an
earlier time was a factor
to be considered in de-
termining whether the
contractor had satisfied
its burden of proof.---

114

Where a road was not in the
location specified by the
drawings and the Gov-

CONTRACTS—Continued
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TION—Continued

Drawings and Specifications—
Continued Page

ernment relocated two of
the towers in order to
avoid difficulties and ex-
penses associated with
having the legs of one of
the towers located on the
slope of a cut through
which the road had been
constructed, the Board
holds that the specifica-
tions were defective and
that the contractor was
entitled to an equitable
adjustment for all costs
incurred in attempting to
perform under such spe-
cifications in accordance
with the Changes clause.
Claims involving defect-
ive specifications are re-
cognized exceptions from
the notice requirements
of the Changes clause and
need only be asserted
within a reasonable time
and before final pay-
ment.-----

114

Where the Government ordered
a delay in work pending
a determination as to
methods to be used in
stringing conductor for
power lines and a further
delay pending receipt of
bolts of the length speci-
fied by the drawings for
tower assembly, the con-
tractor was entitled to
an adjustment for the
resulting costs in accord-
ance with the Suspension
of Work clause. The evi-
dence showed that the
delay regarding bolts,
which were to be fur-
nished as GFP, was only
one-half day but was due
to the fact the drawings

CONTRACTS—Continued**CONSTRUCTION AND OPERA-
TION—Continued****Drawings and Specifications—
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specified bolts of an incorrect length. The specifications were thus defective and it is well settled that any delay due to defective specifications is unreasonable...

114

No basis exists for finding either category of changed conditions where the subsurface data furnished by the Government accurately portrays the subsurface conditions actually encountered by the contractor at the site of the work.....

580

A changes claim is denied where the appellant contends that the representatives of the contracting officer improperly failed to issue instructions for the removal of unstable foundation material at specified locations and for its replacement with gravel filter material but the evidence indicates that the failure of the Government representatives to issue such instructions was simply a recognition by them that it was within the contractor's prerogative to determine the methods and equipment to be utilized in performing the contract...

580

Where, in the course of installing and connecting new sand filter units with existing units under a contract to modify a water system, which provided that no separate payment would be made for pipe and fittings in-

CONTRACTS—Continued**CONSTRUCTION AND OPERA-
TION—Continued****Drawings and Specifications—
Continued**

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cluded with the filter units, but pipe and fittings required for connecting the units to existing piping would be paid for at unit prices, a contractor's claim for furnishing certain piping and fittings, which the Government had denied on the ground that its cost should have been included as part of the filter units, was upheld and the contractor was entitled to be paid therefor at unit prices since the material was installed beyond the limits of the new filter units and was thus connecting piping. The contractor's interpretation, which reconciled the specifications and drawings, was reasonable; since a latent ambiguity was present the contractor was not required to seek clarification of any and all doubts or possible differences in interpretation.

759

Duty to Inquire

Where, in the course of installing and connecting new sand filter units with existing units under a contract to modify a water system, which provided that no separate payment would be made for pipe and fittings included with the filter units, but pipe and fittings required for connecting the units to existing piping would be paid for at unit prices, a

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Duty to Inquire—Continued** Page

contractor's claim for furnishing certain piping and fittings, which the Government had denied on the ground that its cost should have been included as part of the filter units, was upheld and the contractor was entitled to be paid therefor at unit prices since the material was installed beyond the limits of the new filter units and was thus connecting piping. The contractor's interpretation, which reconciled the specifications and drawings, was reasonable; since a latent ambiguity was present the contractor was not required to seek clarification of any and all doubts or possible differences in interpretation..... 759

Estimated Quantities

A contractor's claim for a time extension based upon an overrun of contract quantities is denied where the evidence shows that the overrun involved was well within the range of overruns experienced by the contractor under other drainage construction contracts on the Columbia Basin Project and the contractor failed to show that the overrun in contract quantities actually delayed the completion of the whole contract work..... 580

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Where a sentence in an oil and gas unit agreement prescribing a royalty rate is grammatically correct and as set out has a reasonable interpretation, its punctuation will not be changed..... 447

In construing contracts, restrictive words normally apply only to the nearest antecedent..... 447

The doctrine of practical construction does not apply unless an agreement is ambiguous..... 447

An oil and gas unit agreement, as other agreements, is not ambiguous merely because the parties disagree as to its meaning if the disagreement is not based on the reasonable uncertainty of the meaning of the language..... 447

Where, in the course of installing and connecting new sand filter units with existing units under a contract to modify a water system, which provided that no separate payment would be made for pipe and fittings included with the filter units, but pipe and fittings required for connecting the units to existing piping would be paid for at unit prices, a contractor's claim for furnishing certain piping and fittings, which the Government had denied on the ground that its cost should have been included as part of the filter units, was upheld and the contractor was entitled to be paid there-

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****General Rules of Construction—Continued**

for at unit prices since the material was installed beyond the limits of the new filter units and was thus connecting piping. The contractor's interpretation, which reconciled the specifications and drawings, was reasonable; since a latent ambiguity was present the contractor was not required to seek clarification of any and all doubts or possible differences in interpretation.....

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Intent of Parties

The Board reaffirms its original decision pertaining to the Sale of Government-owned property where upon reconsideration it finds that appellant's motion raises no new questions of fact or of law and that contrary to the appellant's assertions the testimony offered as well as the record as a whole supports the Board's decision.....

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Modification of Contracts

A contractor's claim that it should be excused from performance due to a restrictive feature in a contract as awarded which caused impossibility of performance is denied where evidence shows that the contract as awarded was modified by mutual consent and the contractor had no valid excuse for failure to perform the modified contract so that a ter-

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Modification of Contracts—Continued**

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mination for default was proper.....

647

A construction contractor's claim that its agreement to perform certain repairs to concrete structures at no additional cost to the Government was voidable because of duress is denied where the record contains no evidence to support the allegation that the agreement was occasioned by threats of improper default termination, assessment of liquidated damages and withholding of payment..

700

Notices

Where a contract for the construction of two power lines provided that the Government had placed a center hub at each tower location but that the contractor was to check stationing, alignment and elevation of each center hub and to replace missing or destroyed center hubs, the Board rejected the contractor's contention that the fact some of the hubs were missing made the specifications defective since the contract contemplated that some of the hubs might be missing. Although the contractor failed to give the notice required by paragraph (b) of the Changes clause or paragraph (c) of the Suspension of Work clause, the Board, under the circumstances present

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Notices—Continued Page

here, considered the claim for a constructive change or suspension of work while the Government replaced the missing hubs on the merits, holding that the contractor's failure to assert the claim at an earlier time was a factor to be considered in determining whether the contractor had satisfied its burden of proof.-----

114

Where a road was not in the location specified by the drawings and the Government relocated two of the towers in order to avoid difficulties and expenses associated with having the legs of one of the towers located on the slope of a cut through which the road had been constructed, the Board holds that the specifications were defective and that the contractor was entitled to an equitable adjustment for all costs incurred in attempting to perform under such specifications in accordance with the Changes clause. Claims involving defective specifications are recognized exceptions from the notice requirements of the Changes clause and need only be asserted within a reasonable time and before final payment.-----

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DISPUTES AND REMEDIES

Appeals

Where a contractor failed to comply with an Order of the Board calling upon it to file a complaint within

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a certain period of time and thereafter did not show cause, as directed by a second Order, why its appeal should not be dismissed by reason of such failure, the appeal is dismissed for want of prosecution.-----

645

Burden of Proof

Where a contract for the construction of two power lines provided that the Government had placed a center hub at each tower location but that the contractor was to check stationing, alignment and elevation of each center hub and to replace missing or destroyed center hubs, the Board rejected the contractor's contention that the fact some of the hubs were missing made the specifications defective since the contract contemplated that some of the hubs might be missing. Although the contractor failed to give the notice required by paragraph (b) of the Changes clause or paragraph (c) of the Suspension of Work clause, the Board, under the circumstances present here, considered the claim for a constructive change or suspension of work while the Government replaced the missing hubs on the merits, holding that the contractor's failure to assert the claim at an earlier time was a factor to be considered in determin-

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ing whether the contractor had satisfied its burden of proof-----	114
A contractor's claim for an equitable adjustment for costs incurred in allegedly accelerating performance of the work was denied where appellant failed to establish that the costs claimed resulted from the denial of proper requests for time extensions, rather than from a belated attempt to overcome the effects of inclement weather, insufficient and inadequate equipment, etc., for which the Government was not responsible-----	115
A contractor's appeal from imposition of excess costs on a reprourement after a termination for default is sustained where the Government failed to prove entitlement to excess costs when it chose to stand on evidence that it had awarded a reprourement contract at a higher price and had sent the defaulted contractor a bill for collection of the difference between the original contract price and the reprourement contract price. The Government's burden of proof when excess costs are challenged requires introduction of proof of performance and payment under the reprourement contract, which proof was not furnished by the Government-----	647

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Where, under a construction contract containing a suspension of work clause, issuance of the notice to proceed was delayed pending a decision on a protest of the award, the contractor's claim for increased costs because the delay necessitated a portion of the work being performed in the winter months was denied where the evidence failed to show a causal connection between the initial delay and performance in the winter-----	700
A construction contractor's claim for the costs of certain repairs allegedly directed by the contracting officer was denied where the evidence failed to establish that the methods of repair actually utilized were more expensive than methods of repair in the specification or which could reasonably have been required by the contracting officer---	700
A construction contractor's claim that its agreement to perform certain repairs to concrete structures at no additional cost to the Government was voidable because of duress is denied where the record contains no evidence to support the allegation that the agreement was occasioned by threats of improper default termination, assessment of liquidated damages and withholding of payment---	700

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- A construction contractor's claim for the costs of certain repairs allegedly directed by the contracting officer was denied where the evidence failed to establish that the methods of repair actually utilized were more expensive than methods of repair in the specification or which could reasonably have been required by the contracting officer.....

700

Actual Damages

- An excess cost assessment under a contract terminated for default is found to be proper where the repro-curement contractor offered equipment from the same supplier the defaulted contractor had contemplated using at a total price considerably less than the total price the defaulted contractor had requested prior to proceeding with contract performance and the defaulted contractor did not even allege that in effecting the repro-curement the Government had failed to mitigate damages.....

1

- A contractor's appeal from imposition of excess costs on a repro-curement after a termination for default is sustained where the Government failed to prove entitlement to excess costs when it chose to stand on evidence that it had awarded a repro-curement contract at a higher price and had sent the de-

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- faulted contractor a bill for collection of the difference between the original contract price and the repro-curement contract price. The Govern-ment's burden of proof when excess costs are challenged requires intro-duction of proof of per-formance and payment under the repro-curement contract, which proof was not furnished by the Government.....

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Liquidated Damages

- A claim of substantial comple-tion asserted under a contract for the installation of buried agricultural drains is denied where the evidence of record shows that the project would not adequately serve its intended purpose earlier than the date the work was accepted as substan-tially complete by th Government.....
- A supply contract provision for liquidated damages which set a fixed amount per unit per day for delay was not a reasonable fore-cast of just compensation for the harm caused by the delay where it could be determined in advance that the only harm to the Government would be an additional installation cost for each unit and the assessment of liquidated damages under such contract provision was found to be an unenforceable penalty.....

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Equitable Adjustments

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Where the Government ordered a delay in work pending a determination as to methods to be used in stringing conductor for power lines and further delay pending receipt of bolts of the length specified by the drawings for tower assembly, the contractor was entitled to an adjustment for the resulting costs in accordance with the Suspension of Work clause. The evidence showed that the delay regarding bolts, which were to be furnished as GFP, was only one-half day but was due to the fact the drawings specified bolts of an incorrect length. The specifications were thus defective and it is well settled that any delay due to defective specifications is unreasonable. 114

Where under a contract for a printing press a contractor is required to furnish a device known as a punch in order to meet its alleged contractual obligation and where the evidence of record shows that the punch was listed as an optional item of equipment in the descriptive literature accompanying the bid upon which the contract was based, the Board determines the contract price should be equitably adjusted to reflect the furnishing of the punch. 663

CONTRACTS—Continued
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Jurisdiction

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Where, under a contract to furnish laundry services which provided that the quantities of work to be done were based upon estimates and that the Government reserved the right to increase or decrease them by 25%, a contractor was called upon to perform work in an amount below 75% of the estimates, his claim to be paid for the difference between the service actually performed and the amount estimated, less 25 percent, is dismissed in the absence of contract clauses upon which the Board can provide relief. 258

The Government's motion to dismiss for lack of jurisdiction a claim asserted under the changes clause of a construction contract was denied where the funding schedule adopted by the contracting agency increased the time required for performance, altered the approved construction program and led to a cessation of work for lack of funds; the contingency provisions of the Funds Available for Earnings Clause were not involved when Congress appropriated funds in the amount deemed necessary and requested by the contracting agency and Congress was not the source of the fund short-

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age; the Government's assertion that the fund shortage was a breach of contract over which the Board has no jurisdiction was erroneously based on cases wherein Congress had reduced or failed to appropriate the funds requested of it-----

354

Termination for Default

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake-in-bid claim and (ii) requesting an adjustment in the contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon-----

1

An excess cost assessment under a contract terminated for default is found to be proper where the procurement contractor offered equipment from the same supplier the defaulted contractor had contemplated using at a total price considerably less than the total price the defaulted contractor had requested prior to proceeding with contract performance and the defaulted contractor did not even allege that in effecting the procurement the Government had failed to mitigate damages-----

1

CONTRACTS—Continued
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Termination for Default—Con.

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A contractor's claim that it should be excused from performance due to a restrictive feature in a contract as awarded which caused impossibility of performance is denied where evidence shows that the contract as awarded was modified by mutual consent and the contractor had no valid excuse for failure to perform the modified contract so that a termination for default was proper-----

647

FORMATION AND VALIDITY

Bid Award

Where under a contract for a printing press a contractor is required to furnish a device known as a punch in order to meet its alleged contractual obligation and where the evidence of record shows that the punch was listed as an optional item of equipment in the descriptive literature accompanying the bid upon which the contract was based, the Board determines the contract price should be equitably adjusted to reflect the furnishing of the punch--

663

Mistakes

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake-in-bid claim and (ii) requesting an adjustment in the

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contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon-----

1

PERFORMANCE OR DEFAULT**Generally**

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake - in - bid claim and (ii) requesting an adjustment in the contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon-----

1

Acceleration

A contractor's claim for an equitable adjustment for costs incurred in allegedly accelerating performance of the work was denied where appellant failed to establish that the costs claimed resulted from the denial of proper requests for time extensions, rather than from a belated attempt to overcome the effects of inclement weather, insufficient and inadequate equipment, etc., for which the Government was not responsible-----

115

Acceptance of Performance

A construction contractor's claim for the costs of certain repairs allegedly directed by the con-

CONTRACTS—Continued**PERFORMANCE OR DEFAULT—Continued****Acceptance of Performance—Continued**

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tracting officer was denied where the evidence failed to establish that the methods of repair actually utilized were more expensive than methods of repair in the specification or which could reasonably have been required by the contracting officer-----

700

Breach

An excess cost assessment under a contract terminated for default is found to be proper where the procurement contractor offered equipment from the same supplier the defaulted contractor had contemplated using at a total price considerably less than the total price the defaulted contractor had requested prior to proceeding with contract performance and the defaulted contractor did not even allege that in effecting the procurement the Government had failed to mitigate damages-----

1

Compensable Delays

Where, under a construction contract containing a suspension of work clause, issuance of the notice to proceed was delayed pending a decision on a protest of the award, the contractor's claim for increased costs because the delay necessitated a portion of the work being performed in the winter months was denied where the evidence failed to

CONTRACTS—Continued

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Compensable Delays—Con.

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show a causal connection between the initial delay and performance in the winter-----

700

Excusable Delays

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake-in-bid claim and (ii) requesting an adjustment in the contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon-----

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115

A contractor's claim for a time extension based upon an overrun of contract quantities is denied where the evidence shows that the overrun involved was well within the range of overruns experienced by

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Excusable Delays—Con.

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the contractor under other drainage construction contracts on the Columbia Basin Project and the contractor failed to show that the overrun in contract quantities actually delayed the completion of the whole contract work-----

580

No basis exists for finding either category of changed conditions where the sub-surface data furnished by the Government accurately portrays the sub-surface conditions actually encountered by the contractor at the site of the work-----

580

Impossibility of Performance

A contractor's claim that it should be excused from performance due to a restrictive feature in a contract as awarded, which caused impossibility of performance, is denied where evidence shows that the contract as awarded was modified by mutual consent and the contractor had no valid excuse for failure to perform the modified contract so that a termination for default was proper-----

647

Substantial Performance

A claim of substantial completion asserted under a contract for the installation of buried agricultural drains is denied where the evidence of record shows that the project would

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Continued

Substantial Performance—
Continued

not adequately serve its intended purpose earlier than the date the work was accepted as substantially complete by the Government-----

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581

Suspension of Work

Where a contract for the construction of two power lines provided that the Government had placed a center hub at each tower location but that the contractor was to check stationing, alignment and elevation of each center hub and to replace missing or destroyed center hubs, the Board rejected the contractor's contention that the fact some of the hubs were missing made the specifications defective since the contract contemplated that some of the hubs might be missing. Although the contractor failed to give the notice required by paragraph (b) of the Changes clause or paragraph (c) of the Suspension of Work clause, the Board, under the circumstances present here, considered the claim for a constructive change or suspension of work while the Government replaced the missing hubs on the merits, holding that the contractor's failure to assert the claim at an earlier time was a factor to be considered in determining whether the contractor had satisfied its burden of proof-----

114

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Suspension of Work—Con.

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Where the Government ordered a delay in work pending a determination as to methods to be used in stringing conductor for power lines and a further delay pending receipt of bolts of the length specified by the drawings for tower assembly, the contractor was entitled to an adjustment for the resulting costs in accordance with the Suspension of Work clause. The evidence showed that the delay regarding bolts, which were to be furnished as GFP, was only one-half day but was due to the fact the drawings specified bolts of an incorrect length. The specifications were thus defective and it is well settled that any delay due to defective specifications is unreasonable-----

114

Where, under a construction contract containing a suspension of work clause, issuance of the notice to proceed was delayed pending a decision on a protest of the award, the contractor's claim for increased costs because the delay necessitated a portion of the work being performed in the winter months was denied where the evidence failed to show a causal connection between the initial delay and performance in the winter-----

700

Waiver and Estoppel

The Department of the Interior is not estopped from requiring the operator of an

CONTRACTS—Continued

PERFORMANCE OR DEFAULT—Continued

Waiver and Estoppel—Con. Page

oil and gas unit agreement to submit corrected reports, to recalculate royalty payments, and to pay additional money owed the government even though it accepted lower payments in the past where the lower payments were unauthorized.....

447

Normally, there can be no estoppel against the government based on the incorrect or unauthorized acts of its employees.....

457

CONVEYANCES

GENERALLY

Where the United States disposes of public lands with a reservation of minerals to the United States, the reserved minerals are not subject to location under the general mining laws in the absence of specific statutory authority. Minerals reserved to the United States in a patent to the City of Phoenix issued pursuant to the Act of July 15, 1921, 42 Stat. 143, are not subject to the mining laws, as neither that Act nor any other statute provides for disposition of the reserved minerals under the mining laws.....

65

DESERT LAND ENTRY

GENERALLY

Where a group of desert land entrymen have leased their entries for a term of 15 years, with an option to purchase at the end of the lease, given full control of the entries to the

DESERT LAND ENTRY—Con.

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lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a corporation, and holding of more than 320 acres of desert land by one person or association. Accordingly, the entries must be canceled.....

794

The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run.....

795

An applicant whose desert land entry, suspended for many years by the decision in *Maggie L. Havens* and who was allowed the 19 months provided by the Secretary's notice of Dec. 2, 1965, to submit proof of compliance with the requirements of the Desert Land Act, is not to be given further time when the evidence adduced in a contest against the entry shows that compliance with the cultivation and reclamation requirements of the desert land law was not accomplished within the life of the entry; the existence of a contest

DESERT LAND ENTRY—Con.

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against the entry does not suspend the entry while the contest is pending and thus permit compliance with the requirements for perfection of the entry beyond the statutory life of the entry----- 795

ASSIGNMENT

Where a group of desert land entrymen have leased their entries for a term of 15 years, with an option to purchase at the end of the lease, given full control of the entries to the lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a corporation, and holding of more than 320 acres of desert land by one person or association. Accordingly, the entries must be canceled. 794

The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run----- 795

CANCELLATION

Where a group of desert land entrymen have leased their entries for a term of 15 years, with an option to purchase at the

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end of the lease, given full control of the entries to the lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a corporation, and holding of more than 320 acres of desert land by one person or association. Accordingly, the entries must be canceled. 794

The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run----- 795

CULTIVATION AND RECLAMATION

Where a group of desert land entrymen have leased their entries for a term of 15 years, with an option to purchase at the end of the lease, given full control of the entries to the lessees, and deposited in escrow warranty deeds conveying the land in their entries, the agreements violated the provisions of the Desert Land Law against sale of entries prior to patent, assignments for the benefit of a corporation, and holding of more

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than 320 acres of desert land by one person or association. Accordingly, the entries must be canceled.....	794
The doctrine of voluntary rescission of an alleged contract to sell a desert land entry after patent is not to be applied in these circumstances, particularly where the rescission comes long after a contest has been brought against the entries, the money paid to entrymen has not been refunded, and the life of entry has run.....	795
An applicant whose desert land entry, suspended for many years by the decision in <i>Maggie L. Havens</i> and who was allowed the 19 months provided by the Secretary's notice of Dec. 2, 1965, to submit proof of compliance with the requirements of the Desert Land Act, is not to be given further time when the evidence adduced in a contest against the entry shows that compliance with the cultivation and reclamation requirements of the desert land law was not accomplished within the life of the entry; the existence of a contest against the entry does not suspend the entry while the contest is pending and thus permit compliance with the requirements for perfection of the entry beyond the statutory life of the entry.....	795

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Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. § 38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue.....	687

EXCHANGES OF LAND

(See also Indian Lands, Private Exchanges.)	
GENERALLY	
By regulation the filing of a formal exchange application under the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), segregates the selected land from appropriation under the mining laws. A mining claim located on such land thereafter is void ab initio and affords no basis for a protest against the exchange.....	188
Land within a mining claim validated by a discovery before a conflicting private exchange application is filed is not available for selection in exchange, but if the claim is not valid the land status is not affected. However, a mining claim cannot be declared invalid for a lack of a discovery without due notice to the claimant and opportunity for a hearing.....	188
Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the	

EXCHANGES OF LAND—Con.**GENERALLY—Continued**

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Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown....

188

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department.....

188

EXECUTIVE ORDERS AND PROCLAMATIONS

Executive orders have the force and effect of law and rules of statutory construction apply to them.

65

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which with-

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drawal closed the lands to nonmetalliferous location under the mining laws....

65

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969**GENERALLY**

The term "persons" includes the singular "person" as well as the plural "persons" when used in sec. 314(a) of the Act (30 CFR 75.1400) to determine when overspeed, overwind, and automatic stop controls are required on hoists.....

637

ABATEMENT**Time for Abatement**

Where the operator contends that the time for abatement in Notices of Violation is unreasonable solely because the alleged violation did not occur, a finding of violation moots such contention where the violation has been abated.....

431

**ADMINISTRATIVE PROCEDURE
Decisions**

It is error for an Administrative Law Judge to find that a condition cited in a notice of violation was "serious," without identifying the potential hazard and the probability of its occurrence, and to find an operator "negligent" without indicating the source of the inference or the act or acts of commission or omission.....

205

Dismissals

It is an abuse of discretion by an Administrative Law Judge to grant a motion by MESA to withdraw part of a petition for assessment of civil penal-

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AND SAFETY ACT OF 1969—Con.**

**ADMINISTRATIVE PROCEDURE—
Continued**

Dismissals—Continued

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ties *with* prejudice, when
by granting such motion
without prejudice, the
effect of foreclosing the
Secretary's enforcement
agency (MESA) from liti-
gating *all* the violations
alleged in a withdrawal
order on their merits can
be avoided.

30 U.S.C. § 819(a)(1), 43 CFR
4.512

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Findings

Where an Administrative Law
Judge fails to incorporate
in his decision appropri-
ate findings of fact or to
state the reasons therefor,
as required by the Ad-
ministrative Procedure
Act, in lieu of a remand,
the Board may make the
appropriate corrections
for the Department in
accordance with the evi-
dence of record.

285

Hearings

Order of Proof

The Interior, Board of Mine
Operations. Appeals will
not overturn a proce-
dural ruling by an Ad-
ministrative Law Judge
assigning the burden of
going forward with re-
spect to a particular issue
unless the record mani-
fests an abuse of discre-
tion by showing such
ruling to have a clear
prejudicial effect upon
the objecting party.

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APPEALS

Generally

The Board will not disturb the
findings and conclusions
of an Administrative Law
Judge in the absence of a

**FEDERAL COAL MINE HEALTH
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showing that the evi-
dence compels a different
result.

173

The Board will not disturb the
findings of fact of an Ad-
ministrative Law Judge
in the absence of a show-
ing that the evidence
compels a different re-
sult.

443

Where the Administrative Law
Judge has taken into
consideration mitigating
circumstances advanced
by the operator in deter-
mining the assessment of
penalties, and where ap-
pellant's arguments have
been fully and fairly con-
sidered by the Judge, the
Board will not disturb the
Judge's decision where
his findings are supported
by substantial evidence.

463

The decision in *United States v.*
Finley Coal Company, 493
F. 2d 285 does not bar
enforcement of sec. 304
(a) of the Federal Coal
Mine Health and Safety
Act, 30 U.S.C. § 864(a).

532

The decision in *United States v.*
Finley Coal Company, 493
F. 2d 285 relates solely to
the regulations codified
at 30 CFR 75.400 and
does not invalidate any
other regulations codified
in other sections of 30
CFR Part 75.

532

The Board will not disturb the
findings and conclusions
of an Administrative Law
Judge in the absence of a
showing that the evidence
compels a different re-
sult.

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**FEDERAL COAL MINE HEALTH
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The Board will not disturb the findings and conclusions of an Administrative Law Judge in the absence of a showing that the evidence compels a different result..... 713

A challenge to the specificity of a pleading is waived on appeal when not made before the trier of fact... 730

APPLICATIONS FOR REVIEW

Pleading

By virtue of 43 CFR 4.532(a) (1), the validity or non-existence of an underlying sec. 104(c)(1) notice should be specifically pleaded to place the matter properly in issue..... 730

CLOSURE ORDERS

Generally

A shuttle car, as a piece of equipment used in a coal mine, may properly be the subject of a section 104(a) withdrawal order... 147

Imminent Danger

An application for review of a section 104(a) order is properly dismissed where the operator fails to rebut by a preponderance of the evidence the presumption of imminent danger which arises when the order is issued..... 146

An inspector's conclusion that imminent danger existed at the time a section 104(a) order was issued will not be vitiated by the fact that he permitted the subject of the order, a shuttle car, to be moved under his close supervision..... 147

**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
CLOSURE ORDERS—Continued**

Imminent Danger—Con.

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Presence of 1.5 volume per centum or more of methane supports issuance of a sec. 104(a) withdrawal order. Good faith in the voluntary withdrawal of miners and commencement of efforts to abate prior to issuance will not invalidate a withdrawal order..... 153

In an application for review of a section 104(a) order, the order is properly vacated where the operator, by a preponderance of the evidence, proves that imminent danger was not present when the order was issued..... 328

The Interior Board of Mine Operations Appeals will affirm the dismissal of an Application for Review of a sec. 104(a) withdrawal order where the Judge's findings of fact are supported by substantial evidence and he has correctly applied the legal definition of imminent danger..... 333

The Interior Board of Mine Operations Appeals will affirm the dismissal of an Application for Review of a sec. 104(a) withdrawal order where the Judge's findings of fact are supported by substantial evidence and the condition cited constitutes an imminent danger..... 348

An accumulation of loose coal and coal dust in the presence of nonpermissible equipment will support an inspector's find-

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Imminent Danger—Con.

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ing that an imminent
danger situation exists... 428

Accumulations of loose coal and
coal dust together with
sources of potential igni-
tion will support a finding
of imminent danger. 436,
438, 441

The voluntary commencement
of the abatement process
by an operator prior to
issuance of an immi-
nent danger withdrawal
order does not invalidate
the order. 497

A finding that three of four
braking systems of a
self-propelled mantrip car
were inoperative will sup-
port a finding of immi-
nent danger. 502

Evidence of a loose, drummy,
sagging coal roof, which
an inspector reasonably
believes may fall at any
moment, is sufficient to
warrant the conclusion
that the danger of roof
collapse was imminent. ... 529

In a sec. 105(a) proceeding con-
cerning a sec. 104(a)
Order of Withdrawal,
where the operator estab-
lishes by a preponder-
ance of the evidence that
imminent danger did not
exist, the Order is prop-
erly vacated. 562

ENTITLEMENT OF MINERS

Generally

Although the miners are the real
parties in interest they
may be represented by
United Mine Workers of
America in an action
brought under section
110(a) of the Act. 308

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The validity of a section 104(a)
withdrawal order is not in
issue in a proceeding
under section 110(a) of
the Act. 308

The validity of a sec. 104(b)
order is not in issue in a
proceeding under sec. 110
(a) of the Act. 346

The validity of a section 104(b)
withdrawal order is not a
consideration in a pro-
ceeding under section 110
(a) of the Act. 368

Compensation

Immediately upon the issuance
of an order of withdrawal
a claim of compensation
arises. 308

Immediately upon the issuance
of an order of withdrawal,
a claim of compensation
arises. 346

Immediately upon the issuance
of an order of withdrawal
a claim of compensation
arises. 368

While idled miners may be en-
titled to compensation
under section 110(a) of
the Act they are not en-
titled to interest on such
compensation or for costs
sustained. 368

Discrimination

Jurisdiction over allegations of
discrimination based on
pneumoconiosis rests with
the Secretary of Labor,
not the Secretary of the
Interior, under sec. 428
of the Act. 423

EVIDENCE

Burden of Proof

A visual observation standing
alone will not suffice
to meet the Mining En-

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tition for hearing and
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ment Officer under 43
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ing Enforcement and
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connection with alleged
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ceeding, a coal mine op-
erator shows that he
needs inspectors' reports
and notes, prepared in
connection with the is-
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tion or orders of with-
drawal, so that he may
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cause for an order of
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report indicating a viola-
tion can be admitted as
evidence upon proper
foundation under 28
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if admitted, is considered
a *prima facie* showing of a
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Generally

Where the evidence is sufficient
to establish that the roof
or ribs of a mine were not
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protect persons from falls,
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roof control plan in order
to sustain a violation of
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category of mobile equip-
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is no violation of that
section.....

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operator's employees work
and travel is an "active
working" under 30 CFR
75.2(g)(4) and for that
reason subject to 30 CFR
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without samples from the
roof and ribs, may alone
support a finding that a
violation of section 304(d)
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Protective Equipment

An operator complies with 30
CFR 75.1720(a) if it has
a system designed to as-
sure that miners wear
protective safety goggles
on appropriate occasion,
and if such system in fact
is enforced with due dili-
gence. Where the failure
to wear protective glasses
is entirely the result of
the employee's negligence

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rather than the result of
the failure of the operator
to require the wearing of
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of such safety standard
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**MODIFICATION OF APPLICATION OF
MANDATORY SAFETY STANDARDS**

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tion of the application of
a mandatory safety stand-
ard fails to state grounds
upon which such modifi-
cation could be granted,
even if proved, a motion
to dismiss is properly
granted.....

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does not lose jurisdiction
of a proceeding for modi-
fication of the application
of a mandatory safety
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ties enter into a stipula-
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formal evidentiary hear-
ing unnecessary.....

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NOTICES OF VIOLATION

Generally

Where an operator demonstrates
by a preponderance of the
evidence that defective
equipment was being re-
paired, was not being
used, and was not to be
operated until it met the
required safety standards,
no violation of the Act
occurred.....

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Elements of Proof

The Board will not disturb the
findings and conclusions
of an Administrative Law
Judge in the absence of a
showing that the evi-

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The reasonableness of time al-
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that an operator of a
loading machine was not
making tests for methane
at a working face and was
not equipped to make
such tests does not allege
a violation of the safety
standard in 30 CFR
75.307-1, which requires
that an examination for
methane be made at the
face of each working
place during each shift
and immediately prior
to the entry of electrical
equipment into any work-
ing place 713

PENALTIES

Generally

In a section 109(a) penalty pro-
ceeding the finding of a
violation and assessment
of a civil penalty are not
contingent upon proof
that the order of with-
drawal in which a viola-
tion is cited was issued
according to the enu-
merated, unwarrantable
failure elements of section
104(c) of the Act, and
lack of such proof will
not justify the failure to
assess penalties where it
is shown that a violation
actually occurred 624

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In a default penalty assessment
proceeding, a party will
not be heard on appeal to
challenge evidence it
could have challenged or
rebutted at the hearing
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Existence of Violation

In determining the minimum
quantity of air reaching
the last open crosscut in
any pair or set of develop-
ing entries as required by
sec. 303(b) of the Act,
measurement of such vol-
ume is properly taken in
the last open crosscut
between the two entries
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tive regulation (30 CFR
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An Administrative Law Judge
may admit and give
weight to evidence of
economic losses suffered
as a result of a vacated
withdrawal order, as a
general mitigating factor,
in fixing the amount of
the penalty warranted
because of a violation
arising out of a condition
or practice cited in such
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tor has no legal right to a
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Allegations of economic loss due
to unvacated orders of
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Where an Administrative Law Judge unreasonably fails to take into account losses resulting from a vacated withdrawal order in assessing a penalty for the violation cited in such order, the Board will do so----- 772

Negligence

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A pre-shift examination report by a State certified examiner indicating that a mine area is free from violations of Federal and State law does not preclude a finding that the mine operator was negligent where a violation of Federal law is subsequently found in the area by a federal inspector---- 736

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RESPIRATORY DUST PROGRAM

Generally

Where a computer printout does not show a potential "dump" sample was voided and the record contains no evidence to show that normal laboratory procedures prescribed by the regulations were not followed, or that the sample had been "dumped," an Adminis-

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trative Law Judge errs
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A Notice of Non-Compliance is
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A Notice of Non-Compliance is
an official government
record and will support
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the operator's failure to
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REVIEW OF NOTICES AND ORDERS

Generally

An Application for Review pro-
ceeding of section 104(b)
Notices of Violation
under section 105(a) of
the Act should be sum-

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sec. 104(a) withdrawal
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of, first, whether the con-
ditions cited in the order,
in fact, existed and,
second, whether these
conditions constitute im-
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**UNAVAILABILITY OF EQUIPMENT,
MATERIALS, OR QUALIFIED TECH-
NICIANS**

Assessment of Penalty

Congress never intended that
a notice of violation be
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assessed, where compli-
ance with the mandatory
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is impossible due to the
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Where the operator is unable to
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**FEDERAL COAL MINE HEALTH
AND SAFETY ACT OF 1969—Con.
UNWARRANTABLE FAILURE**

Generally

An inspector is justified in finding an "unwarrantable failure to comply" with a mandatory health or safety standard, pursuant to sec. 104(c) of the Act, where the evidence shows that the operator *intentionally or knowingly* failed to abate a violation or demonstrated a *reckless disregard* for the health and safety of the miners. 30 U.S.C. § 814(c)-----

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568

Closure Orders

Upon issuance of a valid sec. 104(c)(2) closure order, an operator becomes subject to further such orders until a *complete* inspection of the mine discloses no "similar" violations. A *spot* inspection which discloses no "similar" violation is insufficient, by itself, to lift continuing liability to closure. 30 U.S.C. § 814(c)(2)-----

568

Inspections

Since 30 CFR 45.2-1 was not republished in the *Federal Register* after enactment of the Federal Coal Mine Health and Safety Act of 1969 pursuant to section 101(j) of that Act, such regulation lost all force and effect by virtue of the repeal of the Federal Coal Mine Safety Act of 1952 which such regulation purported to interpret. 30 U.S.C. § 811(j) (1970)-----

627

Gravity Requirements

An inspector is justified under sec. 104(c) of the Act, in finding that a violation "*** could significantly and substantially

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UNWARRANTABLE FAILURE—
Continued**

Gravity Requirements—Con.

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contribute to the cause and effect of a mine safety or health hazard * * * if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death. 30 U.S.C. § 814(c)-----

568

Where the evidence of record shows that a violation cited in a sec. 104(c)(1) withdrawal order did *not* reasonably pose a probable risk of serious bodily harm or death, an Administrative Law Judge should conclude that the violation could *not* have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, and should vacate the order-----

730

Notices of Violation

The existence and validity of an underlying sec. 104(c)(1) notice of violation is reviewable in a sec. 105(a) proceeding under the Act as an incident to the determination of the validity of a sec. 104(c)(1) withdrawal order-----

729

Recklessness

Where the evidence does *not* show that the operator consciously disregarded or grossly deviated from a mandatory standard of care in the Act or substantive regulations, an Administrative Law Judge is warranted in finding that there was *no* recklessness and in concluding that there was *no* unwarrantable failure---

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UNWARRANTABLE FAILURE—
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Similarity of Violations

The phrase in sec. 104(c)(2)
of the Act which
reads, “* * * violations
similar to those that re-
sulted in the issuance of
the withdrawal order un-
der paragraph (1) * * *,”
does not mean that all
the violations which
underlie a sec. 104(c)(2)
closure order must be of
the same substantive
nature as the violation
cited in such order. 30
U.S.C. § 814(c)(2)-----

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By the use of the word “similar”
in the phrase of sec. 104
(c)(2) of the Act which
reads, “* * * violations
similar to those that re-
sulted in the issuance of
the withdrawal order un-
der paragraph (1) * * *,”
Congress intended that
all the violations neces-
sarily involved in a sec.
104(c) sequence result-
ing in the issuance of a
sec. 104(c)(2) closure or-
der must have in common
the characteristics enu-
merated in sec. 104(c)(1).
These common charac-
teristics are that the vio-
lation: (1) must not cause
imminent danger; (2)
must be of such nature as
to significantly and sub-
stantially contribute to
the cause and effect of a
mine safety or health
hazard; and (3) must be
caused by an unwarrant-
able failure of an operator
to comply with a manda-
tory health or safety
standard. 30 U.S.C. § 814
(c)(2)-----

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FEDERAL EMPLOYEES AND
OFFICERS

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In the absence of proof of a gen-
eral administrative prac-
tice to notify claimants
who filed notification of
settlement claiming ex-
cessive acreage, and in
the absence of proof that
the claimant was not
notified, no error in the
issuance of an Oregon
Donation Claim Certifi-
cate and patent is shown
sufficient to overcome the
presumption of adminis-
trative regularity, and
sufficient to warrant an
amendment of the
patent-----

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AUTHORITY TO BIND GOVERNMENT

Negotiations between the Na-
tional Park Service and a
millsite claimant result-
ing in a restoration of
certain lands from a with-
drawal, and the relin-
quishment and amend-
ment of millsite claims
to conform to the new
boundary of the with-
drawal, did not bind the
United States under any
contract or estoppel the-
ory from ever contesting
the amended millsite
claims to determine their
validity. The Depart-
ment of the Interior has
authority to contest mill-
site claims even in the
absence of a patent appli-
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toppel against the Gov-
ernment based on the in-
correct or unauthorized
acts of its employees-----

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Improvements placed on permitted land shall be considered affixed thereto unless excepted therefrom under the terms of the permit ----- 218

HEARINGS

(See also Administrative Procedure, Federal Coal Mine Health and Safety Act of 1969, Grazing Permits and Licenses, Indian Probate, Mining Claims, Rules of Practice.)

The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit ----- 65

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department ----- 188

Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. § 38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue ----- 687

HOMESTEADS (ORDINARY)

(See also Stock-Raising Homesteads.) Page

LANDS SUBJECT TO

Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described including the homestead land; as to the homestead land, the withdrawal becomes effective *eo instanti* upon termination of the homestead entry ----- 150

A notice of location filed pursuant to the homestead laws but embracing land covered by a withdrawal is unacceptable for recordation ----- 150

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

LANDS SUBJECT TO

With respect to an Indian allotment application on national forest land, this Department is constrained by the Act of June 25, 1910, 25 U.S.C. § 337 (1970), to accept the finding of the Department of Agriculture that the lands applied for are not more valuable for agricultural or grazing purposes than for the timber found thereon. Such a finding dictates rejection of the application by this Department ----- 111

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When an Indian wishes to sell his allotment to his Indian mother who has ample means and the seller is in need, the area Director must have cogent reasons for disapproval of the sale.....	93
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Cancellation of Tribal Land Assignments are governed by the terms of the assignment as agreed upon by the parties thereto....	499
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Failure of a successful bidder to meet the conditions included in the bid advertisement within time limitations renders the bid deposit subject to retention as liquidated dam-	
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Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of the items in default in the absence of showing that the lessor voluntarily and intentionally waived the requirements under the lease.....	465
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Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of items in default in the absence of showing that lessor voluntarily or intentionally waived the requirements under the lease.....	6511
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Cancellation

Where a long-term business lease, approved by the Secretary, was negotiated by an Indian lessor, and where the lease includes the provision " * * * Lessor, at the sole option of the Lessor, may terminate this lease * * *" such lease may be canceled by the Secretary on behalf of the lessor upon lessor's demand where the default is undisputed and the breach of covenant is material.....	9,
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A lease may be canceled by the Secretary, at the request of the lessor where lessee	
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has failed to carry out
 specific provisions of the
 lease.....

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A lease may be canceled by the
 Secretary, at the request
 of the lessor where lessee
 has failed to carry out
 specific provisions of the
 lease.....

651

Failure to use a leasehold for the
 purpose specified in the
 lease, does not constitute
 a breach of the lease
 terms sufficient to justify
 cancellation of the lease
 in absence of a showing
 on the record of detri-
 ment to the landowners
 or the leasehold.....

719

Official Representations

No issue of estoppel can be raised
 where Federal officers
 make correct representa-
 tions relied upon by third
 persons, and later the
 officials reverse them-
 selves taking an incorrect
 position upon which no
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Acceptance of rentals by the
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205.1.0 Generally

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Failure to appoint a guardian ad litem for minors in probate proceedings violates the provisions of 43 CFR 4.282-----

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A petition for rehearing filed with an Administrative Law Judge was properly denied by the Judge where the petition was not filed within the period prescribed by the applicable regulations-----

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Where the Nez Perce Tribe has indicated its intent to take the interests of the heirs who are not enrolled in that Tribe, under authority of the Act of September 29, 1972 (86 Stat. 744), the order determining the heirs of the decedent does not terminate probate under said Act, further proceedings being necessary for determination of the fair market value, and when for lack of such further proceedings, the time for filing a petition for rehearing does not begin to run upon entry of said order except as to those issues of heirship and the like decided in the order determining heirs.....

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375.0 Generally

Under the delegations of authority by the Secretary to the Board of Indian Appeals in 43 CFR 4.1, the Board has authority and jurisdiction to correct or modify prior Secretarial orders issued in probate of Indian trust estates in accord with the statutes, court decisions and a showing of later-discovered facts....

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Although the superintendent of an Indian agency has no interest in the outcome he is a proper official of the Bureau of Indian Affairs to file a petition for reopening, under the authority of 43 CFR 4.242.....

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It is in the public interest to require Indian Probate proceedings to be concluded within some reasonable time in order that property rights of heirs and devisees in trust allotments be stabilized....

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A petition to reopen, filed more than three years after the original order, will be granted where it is shown that a minor child of the deceased either through mistake, accident, or fraud was not represented at the hearing and as a result thereof was not included as an heir in the original order.....

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To avoid perpetuating a manifest injustice, a petition to reopen filed more than three years after the final determination of the heirs will be granted where compelling proof is shown

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SECRETARY'S AUTHORITY

381.0 Generally

A provision in a will executed
pursuant to 25 U.S.C.
§ 373 (1970) requiring
sale of land interests held
in trust is to be carried
out by the Secretary in
those situations where a
refusal to do so would be
an arbitrary or capricious
abuse of discretion by the
Secretary within the rule
of *Tooahnippah (Gombi)*
v. *Hickel*, 397 U.S. 598,
90 Sup. Ct. 1316 (1970). 95

The Secretary of the Interior
in the absence of specific
legislation, has exclusive
jurisdiction to determine

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the heirs of an Indian
who dies intestate before
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Where it becomes necessary,
the Secretary in the exer-
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authority reserved in 43
CFR 4.5, may assume
original jurisdiction of a
pending Indian probate,
and if no regulations
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effective at the time, he
may remand the case to
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Secretary in the exercise
of the discretion reserved
in 43 CFR 4.5 and 43
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ing of an Indian probate
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ings necessary to the pos-
sible correction of an
error or omission in the
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Where it becomes necessary, the
Secretary may in the
exercise of his supervi-
sory authority reserved in
43 CFR 4.5, assume
original jurisdiction of a
pending Indian probate,
to correct an error of
omission which occurred
after the enactment of a
statute and prior to the
publication of appropri-
ate regulations, and he
may remand the case to
an Administrative Law
Judge for further pro-
ceedings----- 660

INDIAN PROBATE—Continued

STATE LAW

390.0 Generally Page

Under Montana statute, R.C.M. 1947, § 91-404, pertaining to inheritance to and from illegitimate children, a father may not inherit from his illegitimate child unless (1) the father, after marrying the mother, has adopted the illegitimate into his own family, or (2) the father, after marrying the mother of the illegitimate, acknowledges his paternity. 51

390.1 Applicability to Indian Probate, Intestate Estates

390.1.0 Generally

The Department is required to apply the laws of state in which the allotment is located in determining the heirs of deceased allottees. 177

390.2 Applicability to Indian Probate, Testate

A provision in a will executed pursuant to 25 U.S.C. § 373 (1970) appointing an executor shall not be approved insofar as it would be effective upon property held in trust, but as to such property, the duties and directions given by the testator to the executor may be carried out by the Secretary to avoid a defeat of the testator's intent, provided that the Secretary's function is in no way subject to the provisions or requirements of any state court or statute limiting or regulating the power and authority of a personal representative. 95

INDIAN PROBATE—Continued

STATE LAW—Continued

390.2 Applicability to Indian Probate, Testate—Con. Page

A state law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills. 613

A state law providing that a child shall take as if the parent died intestate if the child is not named or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. § 373. 613

TRUST PROPERTY

415.0 Generally

Following the doctrine of equitable conversion, a provision in a will executed pursuant to 25 U.S.C. § 373 (1970) requiring sale of land interests held in trust with the proceeds to be distributed, has the effect of changing the interests in the affected property from land to personalty requiring that the land if unsold or the proceeds of sale, be distributed as personalty. 95

WILLS

425.4 Applicability of State Law

Limitations prescribed by state law have no bearing on the validity of wills made by Indians in disposing of trust allotments or restricted personal property, unless such provisions have been adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills. 556

INDIAN PROBATE—Continued**WILLS—Continued****425.4 Applicability of State Law—Continued**

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Indian probate proceedings involve considerations which go beyond the conventional issues of a state probate proceeding and evidence may be admitted in an Indian probate proceeding which would not be relevant to the probate of a will in a state proceeding----- 556

425.28 Testamentary Capacity**425.28.0 Generally**

Where a will, rational on its face, is shown to have been executed in legal form, the law presumes the testamentary capacity of the testator, that the will speaks his wishes, and in order to overcome such will, the evidence must be clear, cogent and convincing. At the time the will is executed the testator must have sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty---- 197

Testamentary capacity is a question of fact to be determined upon the evidence in the individual case. No general rule can be devised which would be a satisfactory standard for the determination of the issue in all cases----- 197

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Evidence that decedent was a chronic alcoholic, but fails to establish that decedent had suffered damage to his brain to the degree that his memory or ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the deceased----- 657

425.30 Undue Influence**425.30.2 Failure to Establish, Opportunity**

Undue influence is not shown when the mere opportunity existed for the exercise of influence upon the testatrix----- 658

YAKIMA TRIBES**435.0 Generally**

Under the Act of December 31, 1970 (84 Stat. 1874); 25 U.S.C. § 607, it is necessary that an administrative law judge shall make a finding as to the right of the Yakima Tribe to take the interest of an heir or devisee and also a finding, after appraisal, of the fair market value of the interest which the Tribe elects to take----- 517

INDIAN TRIBES

(See also Indian Probate.)

GENERALLY

Ordinances or resolutions passed under a popular referendum of the general membership of the tribe can not override, supplant, or compromise restraints contained in a tribe's constitution and charter---- 281

INDIAN TRIBES—Continued

ORGANIZED TRIBES

Ordinances or resolutions passed under a popular referendum of the general membership of the tribe cannot override, supplant, or compromise restraints contained in a tribe's constitution and charter.----- 281

LIEU SELECTIONS

The acceptance by a State of other lands in lieu of lands lying within the meander line of a nonnavigable lake adjacent to the granted upland school section, was a relinquishment of any interest in the adjacent land underlying the lake as an incident to the grant of the school section and precludes assertion of a State claim to such lands.----- 300

MATERIALS ACT

One whose only interest derives from the fact that he is the holder of a special use permit issued under the Materials Act has only those rights described in the permit, and land covered by such permit is subject to location under the mining laws. The permittee acquires no rights under the mining laws by virtue of his permit and cannot apply for a patent to the land encompassed by his permit.----- 473

MILLSITES

(See also Mining Claims.)

GENERALLY

Negotiations between the National Park Service and a millsite claimant resulting in a restoration

MILLSITES—Continued

GENERALLY—Continued

of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application.----- 262

The filing of a withdrawal application by the National Park Service segregates the land from mining location, and in a contest against millsites within the segregated area requires a claimant to show that millsite claims are valid as of the application date.----- 262

After the Government has made a prima facie case of invalidity, a millsite claimant has the burden of establishing the validity of his claim by a preponderance of the evidence.----- 263

An objective standard of reasonableness will be applied to determine whether a millsite claim is invalid because of the nonuse of a mill structure which had been used in the past.----- 263

Where a mill had not been used for more than a decade prior to a withdrawal application, the mill was then not operable without more than nominal

MILLSITES—Continued**GENERALLY—Continued**

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startup costs, the sources of ore for mill feed were questionable, and a proposed mining and milling operation was economically infeasible, the nonuse of the mill was more than a reasonable interruption in a milling operation, and a millsite claim containing the mill structure will be declared invalid under either clause of the millsite law -----

263

A millsite that is not being used, and which contains no improvements or other evidence of good faith occupation, is properly declared invalid; nor can it be validated on an expectation of future use alone -----

263

ISSUANCE

Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Valid millsite claims situated within the recreation area may not go to patent, but such result does not prevent or interfere with the full exercise of a claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located -----

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MILLSITES—Continued**PATENTS**

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Section 12 of the Act of August 22, 1972, 86 Stat. 612, revoked the authority of the Secretary of the Interior to issue patents for locations and claims in the Sawtooth National Recreation Area. Valid millsite claims situated within the recreation area may not go to patent, but such result does not prevent or interfere with the full exercise of a claimant's right to further work and develop his valid millsite claims subject to compliance with the rules and regulations covering federal land on which such claims are located -----

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MINERAL LANDS**GENERALLY**

Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. §315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown ---

188

MINERAL RESERVATION

Since one who locates a mining claim on stock-raising homestead lands implies that he intends to reenter upon the land and that he has made a discovery

MINERAL LANDS—Continued
MINERAL RESERVATION—Con. Page

thereon, he is no longer a prospector within the purview of the Stock-raising Homestead Act, and in the absence of consent of, or an agreement with, the entryman or surface owner, the mineral claimant is required to post a good and sufficient bond to assure compensatory protection to the surface owner----- 139

Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown----- 188

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

Where the United States owns 100 percent of the gas and 50 percent of the oil in a tract of acquired land, rental for an oil and gas lease on such land will be based on the larger fractional interest owned by the United States, and not on an average of the separate fractional interests----- 530

MINING CLAIMS

GENERALLY

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The Act of Aug. 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1970), authorizes the entry of lands chiefly valuable for building stone under the provisions of law in relation to placer mineral claims, and such entry may be made regardless of the form in which the deposits are found----- 58

Building stone, chiefly valuable for. Building stone as used in the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1970), includes stone used for building, for structural work and for other similar commercial purposes, but land chiefly valuable for the supply of stone to be manufactured into artifacts is not chiefly valuable for building stone under the Act----- 59

The sale of permits to rock hounds to collect stones on claimed lands is not a mining operation within the meaning of the mining law; income from the sale of such permits cannot properly be considered in determining if a discovery of a valuable mineral deposit has been made----- 83

The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as

MINING CLAIMS—Continued

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a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands... 188

A holder of a mining claim is not required to institute adverse proceedings pursuant to 30 U.S.C. §§ 29 and 30 (1970), where the notice of publication of a mineral patent application expressly excludes the area of the claim in conflict..... 188

Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown.... 188

One whose only interest derives from the fact that he is the holder of a special use permit issued under the Materials Act has only those rights described in the permit, and land covered by such permit is subject to location under the mining laws. The permittee acquires no rights under the mining laws by virtue of his permit and cannot apply for a patent to the land encompassed by his permit. 473

MINING CLAIMS—Continued

GENERALLY—Continued

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Where filing fees for adverse claims against mineral patent applications are tendered timely to the appropriate Bureau of Land Management office, and such office erroneously refuses to receive such payment, and accepts payment therefor one day later upon recognition of its error, the payment may be properly regarded as having been made as of the date of tender thereof.... 619

Technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to R.S. 2332, 30 U.S.C. § 38 (1970). The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, and a claimant under this provision is not required to produce record evidence of his location or to give any reason for not producing such evidence..... 686

If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety of mineral thereon at a time when both the land and the mineral were subject to appropriation under the mining laws, and if they thereafter remained in peaceful, exclusive possession and

MINING CLAIMS—Continued

GENERALLY—Continued

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openly worked the claim for the period prescribed by the state statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the improvement of the claim, all such actions having been accomplished prior to July 23, 1955, they have thereby established their right to receive a patent pursuant to 30 U.S.C. § 38 (1970) notwithstanding their failure to file a location notice initially and despite their error in subsequently locating and recording their claim under the statute pertaining to lode locations rather than properly under the placer mining law-----

686

COMMON VARIETIES OF MINERALS

Generally

Without evidence that stones similar to those found in great abundance elsewhere have a property giving them a special and distinct value, they are common varieties no longer locatable under the mining laws. The fact that stone may be tumbled and polished for rock hound purposes is not sufficient to meet the test-----

83

Whether a deposit of building stone is a common variety and no longer locatable under the mining laws since the Act of July 23, 1955, or is still locatable as an uncommon variety, depends on whether it has

MINING CLAIMS—Continued

COMMON VARIETIES OF MINERALS—Continued

Generally—Continued

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a unique property giving it a special and distinct value-----

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To determine whether a deposit of building stone is a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar stone in order to ascertain whether the deposit has a property giving it a distinct and special value. The value may be for some use to which ordinary varieties of building stone cannot be put, or it may be for uses to which ordinary varieties of building stone can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. Special and distinct value may be reflected by a higher market value in comparison with other stones, but higher market value is not the exclusive way of providing that the deposit has a distinct and special value. It is possible that special economic value of the stone may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stones-----

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A deposit of sand and gravel used for ordinary purposes may be considered an uncommon variety of such material only if the

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COMMON VARIETIES OF MINERALS—Continued

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deposit will command an economic advantage over ordinary deposits of sand and gravel due to a unique property which imparts the special and distinct value to the deposit.....

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Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. When the evidence shows that other deposits occur commonly in the area and are similarly used, the fact that the subject deposit has qualities which are particularly well suited to that purpose does not, of itself, alter its essential character as a common variety material.....

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Where a particular mineral material is common, abundant and widespread, certain deposits are bound to exist in closer proximity to the market than other such deposits, but this is only an extrinsic factor which does not make the material any less common..

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Special Value

To determine whether a deposit of building stone is a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar stone in order to ascertain whether the deposit has a property giving it a distinct and special value. The value

MINING CLAIMS—Continued

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may be for some use to which ordinary varieties of building stone cannot be put, or it may be for uses to which ordinary varieties of building stone can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. Special and distinct value may be reflected by a higher market value in comparison with other stones, but higher market value is not the exclusive way of providing that the deposit has a distinct and special value. It is possible that special economic value of the stone may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stones.....

472

A building stone's unique properties of natural fracturing and flat surface cross sectioning which reduce the cost of extraction and installation of the stone impart a special and distinct value to the stone through the generation of profits in excess of those which could be realized from a deposit of common building stone.....

472

A deposit of sand and gravel used for ordinary purposes may be considered an uncommon variety of such material only if the deposit will command an

MINING CLAIMS—Continued

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economic advantage over ordinary deposits of sand and gravel due to a unique property which imparts the special and distinct value to the deposit.....

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Unique Property

To determine whether a deposit of building stone is a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar stone in order to ascertain whether the deposit has a property giving it a distinct and special value. The value may be for some use to which ordinary varieties of building stone cannot be put, or it may be for uses to which ordinary varieties of building stone can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. Special and distinct value may be reflected by a higher market value in comparison with other stones, but higher market value is not the exclusive way of providing that the deposit has a distinct and special value. It is possible that special economic value of the stone may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more while the retail market price would remain competitive with other building stones---

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LODE CLAIMS

Lode claims located for deposits of sand and gravel are void *ab initio*, since the law authorizing the location of lode claims provides no authority for the location of placer deposits of sand and gravel, and a relocation of the lode claims as placer claims in 1965 cannot relate back to and depend upon the lode claims for validity.

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MILLSITES

A millsite claimant is entitled to receive only that amount of land needed for his mining and milling operations, and this amount can embrace a tract of less than five acres. There is nothing within the relevant statute which prevents the Government from granting less than five-acre tracts when need for a lesser amount of surface area is indicated. The reference to five acres within the relevant statute is a maximum, not an absolute, automatic grant.

14

A millsite claimant, when challenged by the Government, must demonstrate use or occupation of all the area claimed within each millsite location before he will be granted a patent for the full amount requested. That area which is not proved to be needed for mining and milling purposes may not go to patent.

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A vague intention to use or occupy land embraced in a millsite claim for mining or milling purposes at some time in the future is not sufficient to comply with the requirements for obtaining a millsite.

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The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands.-----

188

A holder of a mining claim is not required to institute adverse proceedings pursuant to 30 U.S.C. §§ 29 and 30 (1970), where the notice of publication of a mineral patent application expressly excludes the area of the claim in conflict.-----

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POSSESSORY RIGHT

An assertion by a co-owner of a mining claim that his interest has been omitted in another co-owner's application for patent is not an adverse claim within the meaning of the pertinent statutes, 30 U.S.C. §§ 29-32.-----

30

In adverse proceedings between a placer claimant and a lode claimant, a state court may only determine possession to that ground which is encompassed by both claims.-----

30

While the judgment rendered by a state court as a result of adverse proceedings is binding on the parties with respect to possessory rights, the judgment will not bind the Department of the Interior with respect to determination of the validity of the claims or their nature as lode or placer since the Government was not a party to the proceedings.-----

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Where filing fees for adverse claims against mineral patent applications are

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R.S. 2332, 30 U.S.C. § 38 (1970), is not an independent adverse possession statute. It is part of the general mining laws, and necessarily assumes that

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any lands claimed under that statute were open to entry and patent under the mining laws. It has no application to a trespass on land which is closed to mineral entry by withdrawal or reservation, and compliance with the terms of the statute will not "cure" the invalidity of a mining claim located on land which was not open to entry and appropriation under the mining laws----- 686

Technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to R.S. 2332, 30 U.S.C. § 38 (1970). The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, and a claimant under this provision is not required to produce record evidence of his location or to give any reason for not producing such evidence----- 866

If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety of mineral thereon at a time when both the land and the mineral were subject to appropriation under the mining laws, and if they thereafter remained in peaceful, ex-

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SURFACE USES

The sale of permits to rock hounds to collect stones on claimed lands is not a mining operation within the meaning of the mining law; income from the sale of such permits cannot properly be considered in determining if a discovery of a valuable mineral deposit has been made-----

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The Department of the Interior has jurisdiction to determine if a mining claim is invalid by being located on land not subject to mineral location, even where the issue of validity of the claim is raised in the context of a private contest brought by a surface patentee-----

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A mining claim located on land closed to mineral entry is void-----

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Where a state agency holds a Forest Service free use permit to remove mineral materials from designated public land this does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act-----

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R.S. 2332, 30 U.S.C. § 38 (1970), is not an independent adverse possession statute. It is part of the general mining laws, and necessarily assumes

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that any lands claimed under that statute were open to entry and patent under the mining laws. It has no application to a trespass on land which is closed to mineral entry by withdrawal or reservation, and compliance with the terms of the statute will not "cure" the invalidity of a mining claim located on land which was not open to entry and appropriation under the mining laws-----

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MINING CLAIMS RIGHTS RESTORATION ACT

From the effective date of the Mining Claims Rights Restoration Act of August 11, 1955, 69 Stat. §§ 682-683 *as amended*, 30 U.S.C. §§ 621-625 (1970), all lands included in an application to the Federal Power Commission for either a preliminary permit or a license, where no permit has been issued, are open to mineral entry, absent other impediments-----

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The mere filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act does not preclude the operation of the U.S. mining laws as to those lands-----

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Public lands covered by a license, or an application for a license for a power project where already covered by a prelimi-

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OIL AND GAS LEASES

GENERALLY

A noncompetitive oil and gas offer to lease must be rejected where either before or after the filing of the offer and prior to the time of the issuance of the lease the land is determined as of that time to be within the known geologic structure of a producing oil or gas field, even though such offer may have been conditionally approved prior to the inclusion of the land within such structure-----

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While the actions of a state, under its police powers, in establishing spacing units for oil and gas wells is a factor to be considered in determining the acceptability of a communitization agreement, the Department of the Interior reserves the final authority on approving communitization agree-

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A noncompetitive oil and gas offer to lease must be rejected where either before or after the filing of the offer and prior to the time of the issuance of the lease the land is determined as of that time to be within the known geologic structure of a producing oil or gas field, even though such offer may have been conditionally approved prior to the inclusion of the land within such structure.....

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A noncompetitive oil and gas offer to lease must be rejected where either before or after the filing of the offer and prior to the time of the issuance of the lease the land is determined as of that time to be within the known geologic structure of a producing oil or gas field, even though such offer may have been conditionally approved prior to the inclusion of the land within such structure.....

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In the absence of an approved communitization agreement involving a federal oil and gas lease, production of oil and gas from such federal lease is wholly attributable to that lease for computation of royalty due to the United States..... 163

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GENERALLY

Where the extent of an Oregon Donation Claim was determined in the issuance of the certificate and patent by the correct choice between the inconsistent distance calls and acreage computation on the official plat of survey, the action was proper and did not constitute a resurvey of the claim..... 533

AMENDMENTS

An application for amendment of patent by the successors of an Oregon Donation Claim patentee is properly rejected when the applicants request patent to land to which

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the original settler was not entitled because it would have exceeded his statutory entitlement... 534

When a patent was issued in conformity with the duly approved survey at the time of the grant, the rights of patent amendment applicants are not altered or enlarged by the acreage returns in a subsequent private resurvey... 534

Reliance on erroneous notations in federal and county land records can neither serve to divest the United States of title to land, nor estop the United States from denying that title passed or from concluding that a patent cannot be amended to include certain land..... 534

EFFECT

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to non-metalliferous location under the mining laws... 65

Grants by the United States of its public lands bounded

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on streams or other waters, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies..... 300

RESERVATIONS

Where the United States disposes of public lands with a reservation of minerals to the United States, the reserved minerals are not subject to location under the general mining laws in the absence of specific statutory authority. Minerals reserved to the United States in a patent to the City of Phoenix issued pursuant to the Act of July 15, 1921, 42 Stat. 143, are not subject to the mining laws, as neither that Act nor any other statute provides for disposition of the reserved minerals under the mining laws..... 65

PAYMENTS

(See also Accounts.)

GENERALLY

Where filing fees for adverse claims against mineral patent applications are tendered timely to the appropriate Bureau of Land Management office, and such office erroneously refuses to receive such payment, and accepts payment therefor one day later upon recognition of its error, the payment may be properly regarded as having been made as of the date of tender thereof..... 619

POWER**RATES**

For the purpose of power rate-making for Reclamation projects the rate and repayment study must show that the proposed rates will produce sufficient revenues in each year of the study (except for a possible initial short transition period) to cover operation and maintenance expenses during the year, including purchased power and wheeling but excluding depreciation and replacements, together with the required interest cost for the year except as interest may be deferred and capitalized in accordance with sound business principles. This is a minimum requirement, and it is independent of the requirement for repayment of the construction investment-----

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PRIVATE EXCHANGES**GENERALLY**

By regulation the filing of a formal exchange application under the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), segregates the selected land from appropriation under the mining laws. A mining claim located on such land thereafter is void ab initio and affords no basis for a protest against the exchange-----

188

Land within a mining claim validated by a discovery before a conflicting private exchange application is filed is not available for selection in exchange, but if the claim

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is not valid the land status is not affected. However, a mining claim cannot be declared invalid for a lack of a discovery without due notice to the claimant and opportunity for a hearing-----

188

Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown--

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By regulation the filing of a formal exchange application under the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), segregates the selected land from appropriation under the mining laws. A mining claim located on such land thereafter is void ab initio and affords no basis for a protest against the exchange-----

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The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in

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Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown... 188

PUBLIC LANDS

(See also Boundaries, Surveys of Public Lands.)

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A meander line is not a line of boundary, although it may be given that effect by a withdrawal, exception, reservation or relinquishment of lands which border thereon... 300

Federal laws govern the rights a holder of a state water right has to inundate federal lands for a portion of a reservoir..... 340

DISPOSALS OF

Generally

In the absence of proof of a general administrative practice to notify claimants who filed notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown

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sufficient to overcome the presumption of administrative regularity, and sufficient to warrant an amendment of the patent..... 534

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Grants by the United States of its public lands bounded on streams or other waters, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies..... 300

The acceptance by a State of other lands in lieu of lands lying within the meander line of a nonnavigable lake adjacent to the granted upland school section, was a relinquishment of any interest in the adjacent land underlying the lake as an incident to the grant of the school section and precludes assertion of a State claim to such lands.

REGULATIONS

(See also Administrative Procedure).

GENERALLY

In the absence of proof of a general administrative practice to notify claimants who filed notification of settlement claiming excessive acreage, and in the absence of proof that the claimant was not notified, no error in the issuance of an Oregon Donation Claim Certificate and patent is shown sufficient to overcome the presumption of administrative regularity, and

REGULATIONS—Continued**GENERALLY—Continued**

sufficient to warrant an amendment of the patent..... 534

RIGHTS-OF-WAY

(See also Indian Lands.)

GENERALLY

Federal laws govern the rights a holder of a state water right has to inundate federal lands for a portion of a reservoir..... 340

Where a state agency holds a Forest Service free use permit to remove mineral materials from designated public land this does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act..... 473

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A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected..... 340

Pursuant to a regulation, applications to acquire a right-of-way for the main purpose of irrigation should be made under the Act of March 3, 1891..... 340

A reservoir right-of-way under the Act of March 3, 1891, does not give the grantee exclusive fishing or stock-watering rights in the reservoir over federal lands. Fish culture or stock-

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There is no rental charge for the uses authorized by a right-of-way approved under the Act of March 3, 1891..... 340

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A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected..... 340

Pursuant to a regulation, applications to acquire a right-of-way for the main purpose of irrigation should be made under the Act of March 3, 1891..... 340

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A reservoir right-of-way under the Act of March 3, 1891, does not give the grantee exclusive fishing or stock-watering rights in the reservoir over federal lands. Fish culture or stock-watering is not a public use nor an authorized subsidiary use of a right-of-way under the Act of March 3, 1891, as amended..... 340

There is no rental charge for the uses authorized by a right-of-way approved under the Act of March 3, 1891..... 340

RULES OF PRACTICE

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(See also Appeals, Contests and Protests, Contracts, Federal Coal Mine Health and Safety Act of 1969, Hearings, Indian Probate.)

GENERALLY

Executive orders have the force and effect of law and rules of statutory construction apply to them-----

65

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to nonmetalliferous location under the mining laws-----

Departmental precedent will be overruled where it is shown: 1) that it is contrary to the law as interpreted by the courts and this Department, and 2) it would result in the disposition of public lands to those not entitled to receive them-----

371

Where an appellant serves appellee, rather than appellee's counsel of record, with the notice of appeal and statement of reasons, and it appears that appellee's response to those documents reflects a full understanding of the cru-

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cial issues involved, summary dismissal of the appeal under 43 CFR 4.402 need not be invoked, and will not be invoked in appropriate situations---

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APPEALS

Burden of Proof

A contract is properly terminated for default on the ground of failure to make timely delivery where the contractor failed to proceed with performance after (i) alleging a post-award mistake-in-bid claim and (ii) requesting an adjustment in the contract price to compensate for the adverse effect the devaluation of the dollar had upon the acquisition cost from a Swiss supplier of the items bid upon-----

1

An excess cost assessment under a contract terminated for default is found to be proper where the reprocurerment contractor offered equipment from the same supplier the defaulted contractor had contemplated using at a total price considerably less than the total price the defaulted contractor had requested prior to proceeding with contract performance and the defaulted contractor did not even allege that in effecting the reprocurerment the Government had failed to mitigate damages-----

1

After the Government has made a prima facie case of invalidity, a millsite claimant has the burden of

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establishing the validity of his claim by a preponderance of the evidence..... 263

Where an applicant for a small tract lease contends that the rental set by the Bureau of Land Management appraisal is excessive, the burden is upon applicant to prove by substantial and positive evidence that the appraisal is in error..... 365

A contractor's claim for a time extension based upon an overrun of contract quantities is denied where the evidence shows that the overrun involved was well within the range of overruns experienced by the contractor under other drainage construction contracts on the Columbia Basin Project and the contractor failed to show that the overrun in contract quantities actually delayed the completion of the whole contract work..... 580

A claim of substantial completion asserted under a contract for the installation of buried agricultural drains is denied where the evidence of record shows that the project would not adequately serve its intended purpose earlier than the date the work was accepted as substantially complete by the Government..... 581

A contractor's appeal from imposition of excess costs on a reprourement after a termination for default is sustained where the

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Government failed to prove entitlement to excess costs when it chose to stand on evidence that it had awarded a reprourement contract at a higher price and had sent the defaulted contractor a bill for collection of the difference between the original contract price and the reprourement contract price. The Government's burden of proof when excess costs are challenged requires introduction of proof of performance and payment under the reprourement contract, which proof was not furnished by the Government..... 647

A construction contractor's claim that its agreement to perform certain repairs to concrete structures at no additional cost to the Government was voidable because of duress is denied where the record contains no evidence to support the allegation that the agreement was occasioned by threats of improper default termination, assessment of liquidated damages and withholding of payment..... 700

Discovery

The resolution of claims of privilege requires an adjustment of the divergent interests involved on an *ad hoc* basis; accordingly, the Board finds that documents furnished a contracting officer by Government personnel regarding a claim filed for

RULES OF PRACTICE—Continued
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Discovery—Continued

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an equitable adjustment are not entitled to be withheld on the ground that they are internal advisory memoranda prepared in contemplation of litigation since, on balance, they relate only to factual matters and, having been furnished the contracting officer prior to issuance of his decision, are not considered to have been prepared in anticipation of litigation. Documents consisting of calculations and drafts of proposed findings of fact are considered to bear upon the mental processes, deliberations, computations and methods by which the contracting officer arrived at his decision and are privileged.....

157

A contractor's request to the Board to initiate action pursuant to 5 U.S.C. § 304 to obtain an Order of a United States District Court directing the issuance of a subpoena to retired Government employees, who cannot therefor be compelled by the Board to testify, requiring their appearance for the taking of their depositions in an appeal, is denied where the contractor has not shown that it has exhausted other means of obtaining the testimony sought.....

182

Where a contractor failed to respond to interrogatories propounded to it pursuant to an Order of the

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Board, on the ground that it did not receive a copy of the interrogatories, which were served upon it by certified mail, and the record contained a Postal Service form showing receipt by the contractor, the Government's motion to apply sanctions against the contractor is granted and the claim relating to the information sought by the interrogatories is dismissed without prejudice to reinstatement if the interrogatories are responded to in 30 days....

615

Dismissal

Where, under a contract to furnish laundry services which provided that the quantities of work to be done were based upon estimates and that the Government reserved the right to increase or decrease them by 25%, a contractor was called upon to perform work in an amount below 75% of the estimates, his claim to be paid for the difference between the service actually performed and the amount estimated, less 25 percent, is dismissed in the absence of contract clauses upon which the Board can provide relief.....

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The Government's motion to dismiss for lack of jurisdiction a claim asserted under the changes clause of a construction contract was denied where the funding schedule adopted by the contract-

RULES OF PRACTICE—Continued
APPEALS—Continued

Dismissal—Continued

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ing agency increased the time required for performance, altered the approved construction program and led to a cessation of work for lack of funds; the contingency provisions of the Funds Available for Earnings Clause were not involved when Congress appropriated funds in the amount deemed necessary and requested by the contracting agency and Congress was not the source of the fund shortage; the Government's assertion that the fund shortage was a breach of contract over which the Board has no jurisdiction was erroneously based on cases wherein Congress has reduced or failed to appropriate the funds requested of it.....

354

Where a contractor failed to respond to interrogatories propounded to it pursuant to an Order of the Board, on the ground that it did not receive a copy of the interrogatories, which were served upon it by certified mail, and the record contained a Postal Service form showing receipt by the contractor, the Government's motion to apply sanctions against the contractor is granted and the claim relating to the information sought by the interrogatories is dismissed without prejudice to reinstatement if the interrogatories are responded to in 30 days....

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Dismissal—Continued

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Where an appellant serves appellee, rather than appellee's counsel of record, with the notice of appeal and statement of reasons, and it appears that appellee's response to those documents reflects a full understanding of the crucial issues involved, summary dismissal of the appeal under 43 CFR 4.402 need not be invoked, and will not be invoked in appropriate situations.....

619

Where a contractor failed to comply with an Order of the Board calling upon it to file a complaint within a certain period of time and thereafter did not show cause, as directed by a second Order, why its appeal should not be dismissed by reason of such failure, the appeal is dismissed for want of prosecution.....

645

Reconsideration

The Board reaffirms its original decision pertaining to the Sale of Government-owned property where upon reconsideration it finds that appellants' motion raises no new questions of fact or of law and that contrary to the appellant's assertions the testimony offered as well as the record as a whole supports the Board's decision.....

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Service on Adverse Party

Where an appellant serves appellee, rather than appellee's counsel of record, with the notice of appeal and statement of

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619

EVIDENCE

Where an applicant for a small tract lease contends that the rental set by the Bureau of Land Management appraisal is excessive, the burden is upon applicant to prove by substantial and positive evidence that the appraisal is in error.....

365

What men have or have not done over a period of years is proper evidence as to the conduct of a prudent man in the same or very nearly the same circumstances. Where oil shale claims had been held for fifty years and no commercial production was achieved on such claims, it must be concluded that no prudent man would have been justified in the belief that the mineral deposit could be developed, extracted, and marketed at a reasonable profit....

371

GOVERNMENT CONTESTS

The procedures of the Department of the Interior in mining contests, where notice and an opportunity for a hearing before a qualified Administrative Law Judge are afforded,

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comply with the Administrative Procedure Act and the due process requirements of the Constitution.....

83

Where a contest complaint makes no charge which refers to a particular matter, and where the Administrative Law Judge states at the hearing that he will confine the proceedings to specific issues which do not include the matter in question, and where, in the course of the hearing, the Judge refused to receive evidence relating to that matter, it is error for the Judge to make a finding as to that matter and employ such finding as part of the rationale of his decision.....

473

HEARINGS

The Administrative Procedure Act requires an agency to give all interested parties an opportunity to participate in an adjudication where time and public interest permit.....

65

The fact that a hearing in a mining contest is conducted by an Administrative Law Judge who is an employee of the Department of the Interior, that there are witnesses employed by this Department, and that appellate review is conducted by Departmental employees does not establish unfairness in the proceeding. To disqualify an Administrative Law Judge, or a member of the Board of Land Appeals reviewing his decision, on the charge

RULES OF PRACTICE—Continued
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of bias, there must be a substantial showing of personal bias; an assumption that he might be predisposed in favor of the Government is not sufficient-----

83

There is no right under the seventh amendment of the Constitution to a jury trial in an administrative hearing on a mining contest, as that amendment does not apply to quasi-judicial administrative proceedings-----

83

Where a contest complaint makes no charge which refers to a particular matter, and where the Administrative Law Judge states at the hearing that he will confine the proceedings to specific issues which do not include the matter in question, and where, in the course of the hearing, the Judge refused to receive evidence relating to that matter, it is error for the Judge to make a finding as to that matter and employ such finding as part of the rationale of his decision-----

473

PRIVATE CONTESTS

The Department of the Interior has jurisdiction to determine if a mining claim is invalid by being located on land not subject to mineral location, even where the issue of validity of the claim is raised in the context of a private contest brought by a surface patentee-----

65

PROTESTS

The holder of a mining claim who fails to file notice of his adverse claim against

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a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands-----

188

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department-----

188

SUPERVISORY AUTHORITY OF THE SECRETARY

In the exercise of its delegated authority pursuant to 43 CFR 4.1, the Interior Board of Land Appeals need not limit its review to a narrow issue where to do so would preserve error or inequity-----

401

WITNESSES

A contractor's request to the Board to initiate action pursuant to 5 U.S.C. § 304 to obtain an Order of a United States District Court directing the issuance of a subpoena to retired Government employees, who cannot therefor be compelled by the Board to testify, requiring their appearance for the taking of their depositions in an appeal, is denied where the con-

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tractor has not shown
that it has exhausted
other means of obtaining
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GENERALLY

The acceptance by a State of
other lands in lieu of
lands lying within the
meander line of a non-
navigable lake adjacent
to the granted upland
school section, was a
relinquishment of any
interest in the adjacent
land underlying the lake
as an incident to the
grant of the school section
and precludes assertion
of a State claim to such
lands..... 300

SMALL TRACT ACT

APPRAISALS

Where an applicant for a small
tract lease contends that
the rental set by the
Bureau of Land Manage-
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sive, the burden is upon
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praisal is in error..... 365

CLASSIFICATION

Before land classified for lease
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Small Tract Act, it is
necessary that the land
be classified for sale in
compliance with the pro-
visions of 43 CFR Part
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RENEWAL OF LEASE

The filing of an application to
lease under the Small
Tract Act does not vest
any legal right or interest
in the applicant, for it is
within the discretion of
the Secretary whether or
not to exercise his au-
thority to lease the land. 365

SMALL TRACT ACT—Continued

RENEWAL OF LEASE—Con.

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Where the Bureau of Land
Management properly de-
termines that land which
had been embraced by a
small tract lease is well
located and ideally suited
for public use as a recrea-
tional area, it may limit
the lease to a nonrenew-
able five-year term..... 365

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Before land classified for lease
may be sold under the
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necessary that the land
be classified for sale in
compliance with the pro-
visions of 43 CFR Part
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STATUTORY CONSTRUCTION

GENERALLY

Executive orders have the force
and effect of law and
rules of statutory con-
struction apply to them. 65

Although there may be no
general rule for distin-
guishing between man-
tory and directory pro-
visions, a statute should
be construed according
to its subject matter and
the purpose for which
it was enacted, and the
intention of the legisla-
ture should be controlling. 316

To deny status as an eligible
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would be an unjust and
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Statutes should be given their
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STATUTORY CONSTRUCTION—Con.**ADMINISTRATIVE CONSTRUCTION** Page

Where a statute directs that administrative action be taken within a stated time frame, but indicates no consequences for failure to comply with the time limit provided, it is necessary to distinguish between the action and the time frame.----- 316

The timetable set forth by Congress in the Act of December 18, 1971, is at best an estimate of time reasonable enough to accomplish the basic purposes of the Act.----- 316

IMPLIED REPEALS

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawal of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to nonmetalliferous location under the mining laws.----- 65

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To deny status as an eligible village to persons in fact entitled to that status would be an unjust and unfair denial of a right specifically granted by Congress, as evidenced in the legislative history.--- 316

STOCK-RAISING HOMESTEADS Page

Since one who locates a mining claim on stock-raising homestead lands implies that he intends to reenter upon the land and that he has made a discovery thereon, he is no longer a prospector within the purview of the Stock-raising Homestead Act, and in the absence of consent of, or an agreement with, the entryman or surface owner, the mineral claimant is required to post a good and sufficient bond to assure compensatory protection to the surface owner.----- 139

SURVEYS OF PUBLIC LANDS**GENERALLY**

A meander line is not a line of boundary, although it may be given that effect by a withdrawal, exception, reservation or relinquishment of lands which border thereon.----- 300

The rule of priority in resolving an internal inconsistency on the face of the official plat of survey is that the more reliable calls for distance prevail over the computation of acreage.----- 533

Where the extent of an Oregon Donation Claim was determined in the issuance of the certificate and patent by the correct choice between the inconsistent distance calls and acreage computation on the official plat of survey, the action was proper and did not constitute a resurvey of the claim.----- 533

When a patent was issued in conformity with the duly approved survey at the

SURVEYS OF PUBLIC LANDS—Con.**GENERALLY—Continued**

time of the grant, the rights of patent amendment applicants are not altered or enlarged by the acreage returns in a subsequent private re-survey-----

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TAYLOR GRAZING ACT**GENERALLY**

Land which might be mineral in character may be selected for a private exchange under sec. 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown-----

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TIMBER SALES AND DISPOSALS

"Cruise sale contract." Form 5430-3 (1966), "Contract for the Sale of Timber, Cruise Sale," is a lump-sum contract for a designated lot of timber in a described area, and the contract price does not vary with the quantity or quality of timber actually located therein-----

546

In legal effect, a vendor's estimate of quantity or quality of a specific lot of in-place dead or down timber is *sui generis* because certainty cannot be determined except by harvesting and, even then, there is room for disagreement as to whether all merchantable timber was harvested by vendee-----

547

TIMBER SALES AND DISPOSALS—Continued

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Where there has been a specific disclaimer of warranty by vendor-Government as to quality and quantity of specified dead trees in a timber cruise sale contract, the parties are deemed to have contracted on the assumption there was a doubt as to such quality and quantity and the risk with regard to such factors must be considered to have been assumed by vendee as one of the elements of the bargain-----

547

Where warranty as to quality and quantity is specifically disclaimed by the Government-vendor in a timber cruise sale contract, only good faith is required of the Government in naming an estimated amount-----

547

Where warranty as to quality and quantity is specifically disclaimed by the Government in a lump-sum cruise timber sale contract, the vendee is not justified in relying on the Government's estimate of quantity or quality for the parties did not intend the estimate to be a basic assumption of the ultimate agreement-----

547

Where a Government estimate in a sale of timber by lot is grossly excessive as to quantity of board feet sold, and cutting of additional timber is authorized in error by a Government timber manager, the Department position as to damages for trespass should be reexamined to determine

TIMBER SALES AND DIS- POSALS—Continued

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whether payment for the additional trees, at the value when cut, may be obtained as a compromise under 4 CFR 103.5 and BLM Manual 5481.12 B and 9230.61....

547

The Government's resale expense should be deducted from the credit granted the vendee of a timber sale contract for timber remaining in place after abatement of the contract.....

547

"Market value of the timber remaining." In sec. 11 of Form 5430-3 (1966)—Contract for the Sale of Timber, "Cruise Sale"—the above phrase refers to a single market value for the entire remaining timber.....

605

Upon expiration of time for cutting and removing timber under a Form 5430-3 (1966) lump sum timber sale contract, the purchaser is entitled to a credit against the amount due, such credit being in the amount of the market value of the timber remaining on the contract area, or its pro rata contract price, whichever is less, computed on a lump sum rather than a per species basis.....

605

TITLE

GENERALLY

Reliance on erroneous notations in federal and county land records can neither serve to divest the United States of title to land, nor estop the United States from denying that title passed or from concluding that a patent can-

TITLE—Continued

GENERALLY—Continued

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not be amended to include certain land.....

534

TRESPASS

GENERALLY

The Superintendent, as a representative of the Secretary, owes a duty to protect the land of a competent Crow Indian against livestock trespass so long as the land remains in trust status and is unleased....

90

Where a Government estimate in a sale of timber by lot is grossly excessive as to quantity of board feet sold, and cutting of additional timber is authorized in error by a Government timber manager, the Department position as to damages for trespass should be reexamined to determine whether payment for the additional trees, at the value when cut, may be obtained as a compromise under 4 CFR 103.5 and BLM Manual 5481.12 B and 9230.61.....

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UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

UNIFORM RELOCATION ASSISTANCE

Moving and Related Expenses

Generally

Benefits under the Act and implementing regulations do not include reimbursement for moving and related expenses in removing a cowshed from the acquired lands where that structure was purchased as part of the realty acquired by the United States and it was removed under authority

**UNIFORM RELOCATION ASSIST-
ANCE AND REAL PROPERTY
ACQUISITION POLICIES ACT OF
1970—Continued**

**UNIFORM RELOCATION ASSIST-
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**Moving and Related Ex-
penses—Continued
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of a provision in the deed
of conveyance which re-
served to the grantor, for
a certain term, the right
to remove all improve-
ments removable from
the land without damage
to the land itself----- Page
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WAIVER

The holder of a mining claim
who fails to file notice of
his adverse claim against
a conflicting mineral pat-
ent application in ac-
cordance with 30 U.S.C.
§ 29 (1970), may not
thereafter assert his claim
as a bar to the issuance
of the mineral patent,
but he may assert his
claim in a protest against
a subsequent private ex-
change application for the
same conflicting lands--- 188

The Department of the Interior
is not estopped from
requiring the operator of
an oil and gas unit agree-
ment to submit corrected
reports, to recalculate
royalty payments, and to
pay additional money
owed the Government
even though it accepted
lower payments in the
past where the lower pay-
ments were unauthorized. 447

Acceptance of rentals by the
lessor subsequent to de-
fault on specific provi-
sions of the lease by the
lessee does not constitute
waiver of the items in

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default in the absence
of showing that the lessor
voluntarily and inten-
tionally waived the re-
quirements under the
lease----- 465

Acceptance of rentals by the les-
sor subsequent to default
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the lease by the lessee does
not constitute waiver of
items in default in the ab-
sence of showing that
lessor voluntarily or in-
tentionally waived the re-
quirements under the
lease----- 651

WATER AND WATER RIGHTS

GENERALLY

Federal laws govern the rights
a holder of a state water
right has to inundate
federal lands for a portion
of a reservoir----- 340

RECLAMATION PROJECTS

Fraudulent Representation

To support a finding of "fraudu-
lent representation,"
based upon a failure to
disclose to the Govern-
ment the "true considera-
tion" for the sale of excess
land, the evidence must
clearly show that the
alleged fraud feisor in-
tended to deceive and
that there was reliance
upon such representation.
43 U.S.C. § 423(e)
(1970)----- 413

Residence Requirements

Where the record does not con-
tain evidence or findings
as to the residence of the
holder of federal water
rights, it will be remanded
for completion. 43 U.S.C.
§ 431 (1970)----- 413

WATER AND WATER RIGHTS—Continued

True Consideration

The term "true consideration" in section 46 of the Omnibus Adjustment Act of 1926 means the actual benefit or detriment or combination thereof accepted by the holder of excess land as the inducement for an agreement to sell. 43 U.S.C. § 423(e) (1970)----- Page 412

WITHDRAWALS AND RESERVATIONS

GENERALLY

The United States can at any time withdraw its consent to occupancy of public land under the mining laws by withdrawal of the land and if the claimant cannot show that the millsite is being occupied or used for mining or milling purposes as of the date of withdrawal, the claim is properly declared invalid----- Page 45

There is a strong presumption against implied repeal of an executive order. If a statute covers the same area as an executive order and they are not absolutely irreconcilable, effect will be given to both. A statute, authorizing a patent of lands to a city, subject to a reservation of minerals to the United States, did not impliedly revoke an Executive Order withdrawing of the lands for classification and in aid of legislation to grant the patent to the city, which withdrawal closed the lands to non-metalliferous location under the mining laws----- Page 65

WITHDRAWALS AND RESERVATIONS—Continued

GENERALLY—Continued

Negotiations between the National Park Service and a millsite claimant resulting in a restoration of certain lands from a withdrawal, and the relinquishment and amendment of millsite claims to conform to the new boundary of the withdrawal, did not bind the United States under any contract or estoppel theory from ever contesting the amended millsite claims to determine their validity. The Department of the Interior has authority to contest millsite claims even in the absence of a patent application----- Page 262

Where a state agency holds a Forest Service free use permit to remove mineral materials from designated public land this does not constitute a withdrawal or serve to segregate the land from appropriation under the mining laws, as does a material site right-of-way issued pursuant to the Federal-Aid Highway Act----- Page 473

EFFECT OF

A mining claim located on land closed to mineral entry is void----- Page 65

Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described including the homestead land; as to

WITHDRAWALS AND RESERVATIONS—Continued

EFFECT OF—Continued

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the homestead land the withdrawal becomes effective *eo instanti* upon termination of the homestead entry-----

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A notice of location filed pursuant to the homestead laws but embracing land covered by a withdrawal is unacceptable for recordation-----

150

The filing of a withdrawal application by the National Park Service segregates the land from mining location, and in a contest against millsites within the segregated area requires a claimant to show that millsite claims are valid as of the application date-----

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R.S. 2332, 30 U.S.C. § 38 (1970), is not an independent adverse possession statute. It is part of the general mining laws, and necessarily assumes that any lands claimed under that statute were open to entry and patent under the mining laws. It has no application to a trespass on land which is closed to mineral entry by withdrawal or reservation, and compliance with the terms of the statute will not "cure" the invalidity of a mining claim located on land which was not open to entry and appropriation under the mining laws----

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POWER SITES

From the effective date of the Mining Claims Rights Restoration Act of August 11, 1955, 69 Stat.

WITHDRAWALS AND RESERVATIONS—Continued

POWER SITES—Continued

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§§ 682-683 *as amended*, 30 U.S.C. §§ 621-625 (1970), all lands included in an application to the Federal Power Commission for either a preliminary permit or a license, where no permit has been issued, are *open* to mineral entry, absent other impediments-----

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The mere filing of applications for a license or a preliminary permit for a power project since the date of the Mining Claims Rights Restoration Act does not preclude the operation of the U.S. mining laws as to those lands-----

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REVOCATION AND RESTORATION

A mining claim located on land closed to mineral entry is void-----

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WORDS AND PHRASES

"*Building stone*, chiefly valuable for." Building stone as used in the Act of August 4, 1892, 30 U.S.C. § 161 (1970), includes stone used for building, for structural work and for other similar commercial purposes, but land chiefly valuable for the supply of stone to be manufactured into artifacts is not chiefly valuable for building stone under the Act-----

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"*Subject to valid existing rights*." Where land included in a homestead entry of record is included among lands withdrawn "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all

WORDS AND PHRASES—Con.	Page
land described including the homestead land; as to the homestead land the withdrawal becomes effective <i>eo instanti</i> upon termination of the homestead entry-----	150
"Including." In construing contracts, "including" is a word of enlargement used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specially mentioned.	447
"Cruise sale contract." Form 5430-3 (1966), "Contract	

WORDS AND PHRASES—Con.	Page
for the Sale of Timber, Cruise Sale," is a lump-sum contract for a designated lot of timber in a described area, and the contract price does not vary with the quantity or quality of timber actually located therein-----	546
"Market value of the timber remaining." In sec. 11 of Form 5430-3 (1966)—Contract for the Sale of Timber, "Cruise Sale"—the above phrase refers to a single market value for the entire remaining timber-----	605